No. 87-5765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KEVIN N. STANFORD,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR PETITIONER

J. DAVID NIEHAUS
Deputy Appellate Defender
Co-Counsel for Petitioner
DANIEL T. GOYETTE
Jefferson District
Public Defender
Of Counsel

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800
Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Does the imposition of the death penalty on a juvenile who was 17 years old at the time of the crime constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

OPINIONS BELOW

The Supreme Court of Kentucky affirmed the petitioner's convictions and death sentence in a published opinion on April 30, 1987. *Stanford* v. *Commonweaith*, Ky., 734 S.W.2d 781 (1987). (Joint Appendix, J.A., 113-138).

No written opinion was rendered by the Ninth Division of the Circuit Court of Jefferson County, Kentucky. However, the final judgment entered by said court is reproduced in the Joint Appendix at 108-112. The Juvenile Division of the District Court of Jefferson County, Kentucky rendered findings of fact in its order transferring jurisdiction of the petitioner's case to Jefferson Circuit Court pursuant to Ky. Rev. Stat. (KRS) 208.170. (J.A. 7-10).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Kentucky Supreme Court was rendered on April 30, 1987, and that court denied a timely petition for rehearing on September 3, 1987. (J.A. 139). The petition for writ of certiorari was filed on November 2, 1987, and was granted on October 11, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Evidence Concerning The Crimes

In the early morning hours of January 8, 1981, Jefferson County police officers found the body of a 20 year old white female, Baerbel Poore, in the back seat of her car. (TE III, 400-401).[1] Ms. Poore had been sexually assaulted and had sustained a non-fatal gunshot wound to the left side of the face and a fatal gunshot wound to the right side of the head near the ear. (TE III, 363-364; TE VI, 809). The previous evening, Ms. Poore's mother had reported her missing from her job as a service station attendant. (TE III, 399-400; TE VII, 931-934, 939-940). The service station had been ransacked and two gallons of gas, a 2-gallon gas can, $143.07 in cash and 300 cartons of cigarettes were taken. (TR VII, 934, 942-946).

The police discovered that the cigarettes were being sold by Owen Smyzer and Alexis Sloan. (TE III, 407; TE IV, 456-457). Sloan said the petitioner told him on January 8, 1981, that he stole the cigarettes from the service station and that a friend of his killed the female attendant. (TE VII, 1010-1023). Sloan divided the cigarettes with Smyzer and they sold them. (TE VII, 1011-1012). On January 13, 1981, the petitioner was interviewed by the police about the cigarettes. He denied having any knowledge about them and was released. (TE III, 408-409; TE IV, 516-518).[2]

Following the petitioner's release, Owen Smyzer gave a statement implicating the petitioner in the sale of the cigarettes. A "pick-up" was issued for the petitioner to be arrested for receiving stolen property over $100.00. He was arrested later on the evening of January 13, 1981. (TE III, 409-410). On

[1] References to the Trial Transcript of Evidence are made TE, Volume and Page. References to the transcripts from other hearings are made TE, Date, Volume, and Page. References to the state court clerk's record are made (TR).

[2] The petitioner requested and was provided with appointed counsel during the interview. (TE Suppression Hearing, TE Supp. Vol. I, 15-18).

January 14, 1981, some keys belonging to the service station were found during a search of the apartment where the petitioner and his mother, Barbara Boller, resided (TE III, 473-478, 495).

Information was developed from the petitioner that Calvin Buchanan may have been involved in the crimes. On January 16, 1981, Calvin allowed the police to tape record a telephone conversation between him and his 17 year old nephew, David Buchanan. On the basis of that conversation, the police went to David's home and took him to police headquarters to be questioned about the crimes. (TE III, 410-412; TE IV 478-479; 532-533).

David told the police that he wanted to clear Calvin and was arrested after he made an oral statement implicating himself in the crimes. (TE III, 417-420; TE IV, 481-486). From David Buchanan, the police learned that a third black juvenile, Troy Johnson, was also involved. A search warrant was obtained for the residence of Johnson's brother, George Wilson. There police recovered a gun that was alleged to have been used in the crime. A two gallon gas can which was identified as the one taken from the service station was recovered from a field adjacent to Wilson's residence. Johnson was arrested after the search. (TE III, 420-421; TE IV, 487-490).

B. Juvenile Court Proceedings

Formal proceedings were initiated against the petitioner, David Buchanan, and Troy Johnson in the Juvenile Session of the Jefferson District Court. The prosecution moved, pursuant to KRS 208.170, to transfer the cases of the petitioner and Buchanan to Jefferson Circuit Court.[3] The juvenile court transferred jurisdiction of the petitioner's case on October 28, 1981 and found that appropriate treatment programs for the

[3] That version of KRS 208.170 which was in effect at the time of the crimes alleged herein is set out in the Appendix (App. 1a at p. 1a-2a) to this brief.

petitioner existed outside Kentucky. (J.A. 7-10). The court further stated (J.A. 8-10):

> Kevin Stanford was born August 23, 1963 . . . [T]he Court finds that he has a low internalization of the values and morals of society and lacks social skills. That he does possess an institutionalized personality and has, in effect, because of his chaotic family life and lack of treatment, become socialized in delinquent behavior. That he is emotionally immature and could be amenable to treatment if properly done on a long term basis of psychotherapeutic intervention and reality based therapy for socialization and drug therapy in a residential facility. . .

The court discussed the petitioner's prior placements in juvenile facilities and noted:

> His progress has been marginal in each based in part on the failure of the County and State to provide meaningful therapy for the child or after care intervention when he was returned after a relatively short time in each placement, to the streets of Jefferson County. His progress was basically that he learned how to behave enough to meet the minimal criteria for release each time approximately or roughly 6 months after placement then cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated.
>
> As to the reason (sic) of prospects of rehabilitation in facilities available to the District Court Juvenile Session, other than the possibility of a bridge status commitment to the State Department of Human Resources with a minimum of approximately six months in an institution, the only facilities for a youth or child of his age with his problems would be out of state placements in specialized long term programs for youth, as per proof the child may benefit from such placement. However, the Court lacks statutory basis to order the state to provide such institutionalization for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation, and the State of Kentucky Department of Human Resources does not, nor does Jefferson County provide a meaningful alternative.

The court then concluded that it was in the best interests of the community and the petitioner to transfer his case to circuit court.

C. Circuit Court Proceedings

1. Pre-Trial Proceedings

The petitioner and David Buchanan were indicted in November, 1981. (TR 81CR1218, 1-3). The petitioner filed a motion requesting the Jefferson Circuit Court to transfer his case back to juvenile court (J.A. 11-15). The petitioner, who is black, presented evidence concerning his amenability to treatment and the racially discriminatory application of Kentucky's transfer statute, KRS 208.170. (J.A. 26-41; App. 2 a-e at pp. 11a-16a). The petitioner also filed a motion which asserted that imposition of the death penalty on a person who was a juvenile at the time of the crime violated the Eighth and Fourteenth Amendments. (J.A. 18-19).

As to the petitioner's amenability to treatment, testimony was given by Dana Mattison and Linda Luking. Mr. Mattison was a psychotherapist with a Jefferson County social service agency and met the petitioner in July-August, 1980. He believed that the petitioner was amenable to treatment and that he needed a one-on-one type treatment program. Earlier treatment programs were unsuccessful because they employed confrontational group treatment and were dysfunctional because they never addressed his particular therapeutic needs as based upon the available psycho-social and psychological information. Moreover, the petitioner was not getting any support from his home environment which was essential for him to succeed in a treatment program. (TE 3/1/82, 112-119, 134-135). The treatment program which the petitioner needed was not available in Kentucky but existed elsewhere and could be implemented in a presently operating Kentucky facility. (*Id.* 124-125, 132).

Linda Luking met the petitioner when she was doing a social work field placement at the Juvenile Detention Center in

Louisville from January to April, 1981. She continued to act as his counselor on a weekly basis from April to December, 1981. (TE 3/1/82, 152-154). The petitioner's childhood was lonely because of his mother's lack of attention and he had a history of substance abuse and needed treatment. (*Id.* 159-164). She considered the petitioner amenable to treatment because of behavioral changes she observed while she was working with him. (*Id.* 155, 163-164).

The petitioner's motion to transfer the case back to juvenile court was denied. (TE 3/1/82, 182-184; J.A. 42-44).

The co-defendant, David Buchanan, filed a motion that he not be subjected to the death penalty. It was premised on his assertion that the petitioner had actually done the shooting. The motion was granted because the prosecution conceded that *Enmund* v. *Florida*, 458 U.S. 782 (1982), precluded the death penalty for the "non-triggerman". (J.A. 54-59). In response, the petitioner renewed a prior motion for a separate trial from Buchanan (J.A. 60-61) and also filed another motion to preclude the death penalty as a possible punishment. (J.A. 63-64).[4] The motions were denied. (TE I, 34; J.A. 62, 65, 69-70). The petitioner and Buchanan were jointly tried in Jefferson Circuit Court.

2. Evidence Introduced at Trial

A. Guilt-Innocence Phase

Troy Johnson testified as a prosecution witness and in exchange his case remained in juvenile court. *Buchanan* v. *Kentucky*, ___ U.S. ___, 107 S.Ct. 2906, 2909 n.2, 97 L.Ed.2d 336 (1987). (TE VII, 1029). Johnson was sent to a juvenile camp for nine months. (*Id.* 1048).

[4] The prior motion for a separate trial was based on the petitioner's inability to cross-examine Buchanan and the introduction of evidence against Buchanan that would be inadmissible against the petitioner. (J.A. 16-17). The motion was denied. (TE 3/1/82, 184-196).

On January 7, 1981, Buchanan talked to him about robbing the service station where Ms. Poore worked and asked Johnson to supply him with a gun. Johnson gave Buchanan his brother's gun and some ammunition. Buchanan then called the petitioner and he and Johnson drove to the petitioner's apartment. Johnson said he waited in his car while Buchanan and the petitioner went into the service station. (TE VII, 1030-1034).

About 30 minutes later, Buchanan returned to Johnson's car with a gas can. He said he had sex with the service station attendant. He and Johnson followed a car that left the service station and when it stopped, Buchanan got out of Johnson's car and said he was going to have more sex with the woman. Johnson heard a shot and said he saw the petitioner leaning toward the driver's side of the other car. As Johnson started his car, he heard a second shot and said the petitioner was still leaning inside the car. (TE VII, 1035-1038). Johnson noticed that another car was behind his vehicle. The petitioner and Buchanan got into his car and they drove away. He said the petitioner gave the gun back to him and he let him out of the car near the service station. Johnson and Buchanan then drove back to Johnson's brother's house. Johnson removed two shells from the gun and threw them and the gas can onto a vacant lot next to the house. (TE VII, 1038-1042).

Kerise Ison and Amona Dorsey were riding together on the night of January 7, 1981. At Oboe Drive and Shanks Lane, a car that was blocking the intersection backed away from Ms. Dorsey's car. Ms. Ison heard gunshots and both women saw two men walking away from another car. The men walked past Ms. Dorsey's car and got into the other car. The women then drove away. (TE VII, 954-960, 964-968, 983-988). At a line-up, both women identified Calvin Buchanan as one of the men they saw. (TE IV 534-536; TE VII, 970-972, 991-992; TE Supp., Vol. II, 167-169, 182). Neither woman identified the petitioner as one of the men they saw that night.

Over the objection of the petitioner, a police officer testified about what Buchanan, who did not testify, told him about the

crimes. (TE IV 482-483).[5] The police officer identified Buchanan and Troy Johnson by name and referred to the third participant as "the other person". (TE 484-486).[6]

The prosecutor also introduced evidence from two jail guards that the petitioner made an incriminating statement to each of them on separate occasions. (TE VIII, 1063, 1080-1082). A fingerprint of the petitioner was obtained from the victim's car. (TE I, 708; TE VII, 915-917). Hairs from black persons were found on the victims body and articles of her clothing. (TE VI, 804-811). Although some of the hairs were said to have originated from the petitioner, Buchanan, or from someone whose hair demonstrated the same characteristics, the prosecution's expert testified that hair comparisons do not constitute a basis for a positive, personal identification. (*Id.* 804-812, 826). There was no other physical or scientific evidence which connected the petitioner to the murder and sex offenses.

In his closing statement, the prosecutor urged the jury not to convict Buchanan of intentional murder because he argued that the evidence showed the petitioner did the shooting. (TE IX, 1332, 1336). The jury rejected that plea and convicted Buchanan and the petitioner of intentional murder, first degree robbery and first degree sodomy. The petitioner was also convicted of receiving stolen property. The jury recommended that he serve sentences of 20 years, 20 years and 5 years, respectively, on the latter three charges. (TE IX, 1346-1348; TR 82CR0406, 241, 244-246, 269, 274-276).[7]

---

[5] The record does not reflect that the jury was admonished that Buchanan's statement was not to be used as evidence against the petitioner.

[6] In the statement, Buchanan told the police that he and "the other person" took turns "raping and sodomizing" the victim. (TE IV, 485). That statement is the only direct evidence of the sexual offenses.

[7] Buchanan was also convicted of first degree rape. He was sentenced to life imprisonment on the murder and 3 consecutive 20 year prison terms on the other crimes. (TR 82CR0406, 371-373).

B. Penalty Phase

The defense presented testimony from nine witnesses. George Boller, the petitioner's stepfather, was divorced from the petitioner's mother, Barbara Boller, when the petitioner was 13 years old. He resided with Mr. Boller for a short time after the divorce. Mr. Boller described the petitioner as a well-behaved child until he underwent a noticeable change around the age of 12 when he began to use drugs regularly. He was not the same boy Mr. Boller had known in the past. (TE X, 1383-1392). They were unable to communicate because of the drug problem and the petitioner could not get along with Mr. Boller's other children. (*Id.* 1391). The petitioner's drug use was becoming more frequent and was particularly bad in November and December, 1981. Mr. Boller attributed the change in the petitioner's personality and behavior to his increasing use of drugs. (*Id.* 1386-1392).

The petitioner spent most of his life with his aunt, Gertrude Dennison. He was an only child but he got along well with her children. However, his relationship to his mother was very distant. He was not able to talk and communicate with his mother but would talk to Ms. Dennison about his problems. (TE X, 1430-1431). She learned that the petitioner was using drugs when he was 13 or 14. His drug usage caused him to become more distant from her. (*Id.* 1432).

James Berry met the petitioner while he was in his class at the Juvenile Employment Skills Program of the Louisville Urban League. He testified that the petitioner was not very verbal and tended to keep matters to himself. He believed that the petitioner's mother and home environment did not provide him with adequate support but the petitioner was reluctant to talk about his home life. He believed that the petitioner could be rehabilitated. (TE X, 1419-1425).

Lloyd Davis, a vocational instructor at the Kentucky Children's Home in Jefferson County, met the petitioner while he was working at another juvenile facility, Rice-Audubon Treatment Center, where the petitioner was a resident. He found

the petitioner to be very withdrawn and confused about his sexual identity. According to Mr. Davis, the Rice-Audubon facility dealt more with group treatment and that juveniles who needed more individualized treatment could obtain it in the penal system. The petitioner was distant from his treatment group at Rice-Audubon and he did not receive any treatment for the confusion about his sexual identity. Mr. Davis, who spent a year in a Kentucky penal institution, believed the petitioner would benefit from the adult penal system. (TE X, 1465-1469).[8]

Mr. Dana Mattison, the Central Intake Supervisor for Diagnosis and Assessment for the Ohio Children's Services Board, also testified. He had previously been employed as a psychotherapist for a social service agency in Jefferson County, Kentucky and had been the director of the Juvenile Employment Skills Project of the Louisville Urban League. He met the petitioner when he entered the program in August, 1980. (*Id.* 1405-1406). The petitioner exhibited a lack of social interaction skills and a history of drug abuse and had problems being reintegrated into the community because of the lack of support systems available to him. (*Id.* 1407-1408).

When the petitioner entered the Employment Skills Project, the program made numerous, unsuccessful attempts to contact his mother. When she was finally contacted, it was noted that her level of supervision of the petitioner was limited due to her work hours and because of "a very dysfunctional relationship between [them]." (*Id.* 1408).

From the time that the petitioner was released from the Rice-Audubon Treatment Center until the time he became involved with the Employment Skills Project, there was "a steady deterioration back into the whole drug abuse syndrome." (*Id.* 1408). The petitioner received no support from his mother and remained in te program until his arrest in January, 1981. (*Id.* 1409).

[8] The petitioner also offered evidence at the penalty phase of the trial from Mr. Steven Smith, who was the Director of Operations with the Kentucky Department of Corrections. Mr. Smith testified about the vocational, educational, and rehabilitative programs offered within the Kentucky penal system. (TE X, 1379-1383).

Mr. Mattison believed that the petitioner was capable of being rehabilitated and that there were a number of programs available throughout the United States. (*Id.* 1409-1410). He believed that the petitioner demonstrated "a lack of the basic nurturing that most people get in their earlier years" and explained that nurturing is a very specific concept in the social sciences and "deals with the kinds of interaction between mother, child, and/or significant others in their environment, that allow a person to feel secure in what they think, how they feel, and how they deal with those feelings which obviously translate into behaviors." (*Id.* 1411). A breakdown in the nurturing process could result in dysfunctional behavior. (*Id.* 1411-1412). The petitioner also needed counseling for a "major propensity" for drug abuse and usage. (*Id.* 1412).

Linda Luking testified that the petitioner, as early as the age of six, was having difficulty developing social relationships. He was confused as to who was his mother and who was his aunt. The petitioner did not have sufficient bonding with his mother and was unable to obtain it from any other source. He experienced isolation partly because his mother worked and was not home very often. (*Id.* 1440-1442). Although the petitioner had a positive family experience when he resided with his stepfather and his stepfather's family, by the age of 12, he had a serious problem with drug addiction. (*Id.* 1441-1442).

Ms. Luking focused on the petitioner's early childhood experiences and memories, the identification of present emotional issues and recognition of the underlying causes, and behavioral control of his reactions to those issues. (*Id.* 1439-1440). Prior to the age of six, the petitioner lived with a grandmother who, because of her physical limitations, had limited ability to come in contact with other people. Consequently, the petitioner lived an isolated existence and had a dog for his only companion. Although he received adequate health care, his early child-

hood inhibited his ability to develop social relationships. (*Id.* 1440).

The petitioner's drug problem eventually drove him from his stepfather's house and he returned to his mother's residence. (*Id.* 1442). During the course of her counseling relationship with the petitioner, Ms. Luking began to notice a substantial change in him. At first, he was difficult to work with but he eventually attained an honor status in the Juvenile Detention Center and his schoolwork began to improve. He began putting in extra time doing some reading, he began writing for the monthly newsletter, he began to voluntarily participate in various projects and demonstrated some interest in the GED program. (*Id.* 1443-1445).

Ms. Luking believed that the petitioner demonstrated rehabilitative potential and was in need of further counseling. In her words, "I saw the beginnings of a desire. I saw him begin to be willing to look at some of those painful pieces in his life. And, I saw a beginning to get in touch with that and work on that a little bit." (*Id.* 1446). She saw the petitioner demonstrate a consistent willingness to look at issues surrounding "a lifetime of rejection". (*Id.* 1447-1448).

On the prosecution's motion, the trial judge, over the objection of defense counsel, excluded the testimony of Robert Jones, a former Kentucky death row inmate who met the petitioner in 1979, while working as a counselor at the Juvenile Detention Center. Jones would have offered testimony about the vocational, educational, and rehabilitation opportunities in the Kentucky penal system and how the petitioner could benefit from them. (TE X 1483-1500; J.A. 72-87).

The prosecution offered no proof during the penalty phase. The jury was instructed on 20 mitigating circumstances and two statutory aggravating circumstances (first degree robbery and first degree sodomy).[9] (J.A. 99-102; TE XI, 1504-1506; TR

[9] The statutory mitigating and aggravating circumstances are set forth in KRS 532.025(2)(a) and (b).

82CR0406, 307-309). The jury was instructed that it could consider as a mitigating circumstance, "[t]hat at the time of the offense Kevin Stanford was of a very youthful age in light of the fact that he was only 17 years old." (J.A. 100; TE XI, 1504; TR 82CR0406, 308). The jury imposed the death penalty on the murder conviction. (J.A. 104; TE XI, 1542; TR 82CR0406, 314).

At sentencing, the petitioner moved the court to impose a sentence less than death. (J.A. 105-107; TR 82CR0406, 385-387). The petitioner's mother, stepsister, stepbrother, another youth and a clergyman made statements requesting the trial court to spare the petitioner's life. The clergyman also presented a petition signed by 400 persons requesting that the petitioner's life be spared. (TE Sentencing, 7-14). The trial court denied the petitioner's motion and sentenced him to death by electrocution for the murder. (*Id.* 29). The petitioner was also sentenced to 55 years imprisonment on the robbery, sodomy, and receiving stolen property convictions. (J.A. 108-111; TE Sentencing, 29-31; TR 82CR0406, 401-404).

SUMMARY OF ARGUMENT

Society has recognized the qualitative difference between juveniles and adults. That recognition is manifested by numerous laws which restrict the rights and conduct of juveniles. The underlying premise of those laws is that juveniles lack the maturity, the social and emotional development, and the cognitive skills to assume the responsibilities of adulthood and to exercise the same degree of reasoned moral judgment that is expected of adults. For nearly all intents and purposes, society has established the age of 18 as the boundary between childhood and adulthood. So pervasive is society's regulation of the lives of juveniles that "evolving standards of decency" prohibit the imposition of capital punishment on a person who was under the age of 18 at the time of committing a crime. The objective criteria by which evolving standards of decency are determined support no other conclusion.

Moreover, the imposition of the death penalty does not advance the deterrence and retribution rationales of capital

punishment. The emotional and psychological immaturity of adolescents preclude them from fully understanding the nature of their actions and appreciating their consequences. Adolescence is a time of life marked by an invincible sense of self and an absence of fear. Death, in any form, is only the most remote of possibilities. Execution for a criminal act is even less likely. Peer pressure and family environment subject adolescents to enormous psychological and emotional stress and they respond by acting impulsively and without the mature judgement expected of adults. These characteristics are shared by all adolescents, even 17 year olds like the petitioner. Thus, the possibility of capital punishment has no deterrent effect.

The extent of retribution depends upon one's culpability. Society holds juveniles less morally culpable for their acts than adults because juveniles are subjected to many internal and external pressures over which they have no control. The responsibility for juvenile crime is shared by the social and educational systems and the adolescent's home and family environment. The death penalty as retribution is thus excessive when imposed on a juvenile who, like the petitioner, is found to be amenable to treatment by the juvenile court but for whom no adequate treatment program exists in the state's juvenile justice system.

The petitioner's case demonstrates that currently existing statutory and due process safeguards in capital sentencing procedures do not provide adequate protection for a 17 year old juvenile. Society treats juveniles as a class, not as individuals, and governs their rights and conduct with inflexible laws. Death penalty jurisprudence focuses on "individualized consideration" of the accused and the offense. Thus, there is fundamental inconsistency in these two approaches, the latter of which is inadequate to protect juveniles from arbitrary imposition of the death penalty.

For example, mitigating circumstances are intended to eliminate arbitrary death sentences. However, "youth" or "age" as mitigating circumstances are hollow safeguards because in very few jurisdictions do they inform the sentencing body of

the "great weight" that a juvenile's age is intended to carry as mitigation. "Youth" as a mitigating circumstance is a sliding scale which applies with equal force to a 16 year old or to a 30 year old. "Age" as a mitigating factor pertains equally to young and elderly defendants. Although the jury was instructed that the petitioner was only 17 at the time of the alleged offenses, it was never informed what consideration that fact should have on the sentencing decision and, in view of the absence of written findings, it was impossible to determine what, if any, weight the petitioner's age was given as a mitigating factor.

Furthermore, most statutes which allow juvenile courts to transfer cases to adult courts do not articulate any standard of proof to govern the determination of whether the transfer criteria have been met and, if so, whether the juvenile should be transferred to adult court. The lack of any standard of proof vests the juvenile court with unbridled discretion which lends itself to arbitrary decision making that forces the juvenile to bear the risk of error. The petitioner's death sentence resulted from arbitrariness in the transfer proceeding because the juvenile court found him to be emotionally immature and amenable to treatment. However, treatment was not provided to him by the juvenile justice system and he was not even given the opportunity for treatment in the adult penal system. Due process requires the state to provide the petitioner with the treatment to which he is amenable and not to execute him.

Finally, the petitioner's death sentence must be vacated because Kentucky did not have a minimum age for capital punishment at the time the crime was committed.

ARGUMENT

I. THE IMPOSITION OF THE DEATH PENALTY ON A JUVENILE WHO WAS SEVENTEEN YEARS OLD AT THE TIME OF COMMITTING A CRIME VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Contemporary society recognizes fundamental differences between juveniles and adults that are manifested in numerous

laws which restrict a juvenile's ability to exercise the same rights and privileges enjoyed by adults. These laws reflect a considered judgment that 18 is the dividing line between childhood and adulthood. People over 18 are expected to have the maturity and judgment necessary to assume the responsibilities, rights and privileges of adults and they are treated accordingly. Persons under 18 are not deemed capable of exhibiting those qualities. Society, by its laws, considers them to be children and treats them as such. The age barrier erected by society is absolute and treats juveniles as a class and not as individuals. On one side of the boundary stand adults and on the other side stand children. There is no middle ground. His age prevents him from being an adult or being treated as an adult. Society's regulation over the lives and rights of juveniles is so pervasive that prevailing constitutional standards require that capital punishment be prohibited for a youth who was under the age of 18 years at the time of committing a crime.

The legal system's treatment of juveniles mirrors the special status they have been afforded by society.[10] See *Kent* v. *United States*, 383 U.S. 541 (1966) and *Application of Gault*, 387 U.S. 1 (1967). Each state has enacted a juvenile justice system which shares the same objectives as society for the treatment of juveniles, i.e. protection, nurturing, guidance, and development. *Kent*, 383 U.S. at 554 n.19. Even if there are instances in which society is justified in transferring juvenile offenders to the adult legal system, the death penalty is such an extreme and thorough repudiation of what is sought to be accomplished by society, the juvenile justice system, and the adult penal system, that its imposition on one who was under 18 at the time

[10] The majority of the states (37 and the District of Columbia) set the age of 18 as the limit on juvenile court jurisdiction. Davis, *Rights of Juveniles* (2d.Ed), see Appendix (App.) B. Wyoming sets the age of 19 as the limit on juvenile court jurisdiction. (*Id.* at App. B-25). Eight states (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, South Carolina and Texas) set jurisdiction at the age of 17 (*Id.* App. B-5, 7, 10, 12, 14, 21-22) and four states (Connecticut, New York, North Carolina and Vermont) set jurisdiction at the age of 16. (*Id.* App. B-3, 16-17, 23).

of committing a crime violates "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).

A. Evolving Standards of Decency

The decision of whether a particular punishment violates the Eighth Amendment is rooted in an analysis which "should be informed by objective factors to the maximum possible extent." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). *Enmund* v. *Florida*, 458 U.S. 782, 788 (1982). An Eighth Amendment analysis requires examination of "relevant legislative enactments", the sentencing decisions of juries, *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S. Ct. 2687, 2691-2692, 101 L.Ed.2d 702 (1988) (plurality opinion), "international opinion", and "the historical development of the punishment at issue". *Enmund*, 458 U.S. at 788. These objective factors are essential in determining evolving and contemporary standards of decency. *Thompson*, 108 S.Ct. at 2692 (plurality opinion).

1. Legislative Enactments

The judicial system and state legislatures have recognized the particular vulnerability of children as well as their inherent inability to function in the same responsible manner as is expected of adults. Legislation restricting children's abilities to exercise the same rights and privileges as adults is intended not only to protect children from themselves but also to protect society from the consequences of their immature judgment and impulsive and irresponsible behavior.

The societal and legal distinctions drawn between adults and juveniles rest on a solid foundation.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the for-

> mative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. *Oklahoma*, 455 U.S. 104, 115-116 (1982) citing *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979). "Children have a very special place in life which law should reflect." *May* v. *Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring).

> [T]he experience of mankind, as well as the long history of our law, recogniz[es] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. *Lopez*, 419 U.S. 565, 590-591 (1975) (Powell, J. dissenting). (emphasis original). There are three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the particular vulnerability of children, their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti* v. *Baird*, 443 U.S. at 634; The paternalistic role assumed by the State stems from a recognition that juveniles are not expected to exercise the same control over impulses or the same reasoned and mature judgment as adults. "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . .". *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979).

These principles have been embodied in numerous laws which deny juveniles some of the most fundamental rights and privileges enjoyed by adults. For example, in all 50 states and the District of Columbia, the right to vote is extended only to those citizens who have attained a minimum age of 18 years old. *Thompson* v. *Oklahoma*, 108 S.Ct. at 2701 (Appendix A).[11] No

[11] The number of states will include the District of Columbia unless otherwise noted.

state permits anyone below the age of 18 years to serve on a jury. *Id.* 108 S. Ct. at 2701-2702 (Appendix B). Forty-four states, including Kentucky (KRS 2.015), define a "minor" as being a person under the age of 18. Five states set the age of majority as being over the age of 18. Two states (Missouri and New York) do not have a uniform age of majority. (See Appendix A, Brief of Florida Collateral Capital Representative as *Amicus Curiae).*[12]

Kentucky places numerous restrictions on the lives and conduct of persons under the age of 18. For example, they cannot vote (Ky. Constitution § 145), purchase or possess alcoholic beverages (KRS 2.015; KRS 244.085) or sit on a jury (KRS 29A.030).[13] Age restrictions are also imposed on the ability to hold public office[14] or engage in certain occupations.[15] These restrictions on juveniles are objective factors which reflect society's considered judgment that a 17 year old boy or girl is still a child, not an adult. Society has drawn a bright line between childhood and adulthood. We live on either side of that line and do not become adults until we cross the threshold of the age barrier which society has erected.

Society's recognition of the fundamental differences between juveniles and adults extends to capital punishment. Thirty-six states permit capital punishment.[16] In 19 of those states "capital punishment is authorized but no minimum age is expressly stated in the death penalty statute." *Thompson* v. *Oklahoma*, 108 S.Ct. at 2694-2695 n.26. However, that fact alone does not

[12] See Appendices D-J in *amicus* brief of Florida Collateral Capital Representative for other restrictions on juveniles.

[13] See App. 3c at p. 19a-20a for a list of other restrictions Kentucky places on juveniles.

[14] See App. 3a at 17a.

[15] See App. 3b at 18a.

[16] See NAACP Legal Defense and Educational Fund, Inc. (hereafter LDF), Death Row U.S.A., (8-1-88), p. 1. It appears that Vermont's maximum sentence for first degree murder is life without parole. Title 13, Vt.Stat.Ann. § 2303 (Supp. 1988).

support the conclusion that those states necessarily intended to bring juveniles under the age of 18 within the purview of their capital punishment statutes. *Thompson*, 108 S.Ct. at 2711 (O'Connor, J., concurring).

Of the 18 states which set a minimum age for the imposition of capital punishment, 12 preclude the execution of a juvenile who was under the age of 18 at the time of the crime, three set the minimum age at 17, and three other states set the minimum age at 16.[17] Thus, 27 states and the District of Columbia prohibit the execution of a person who was under the age of 18 at the time of the offense.[18] This rejection of the imposition of the death penalty for juveniles is not confined to the United States but extends to the international community as well. See *Thompson*, 108 S.Ct. 2696 and Appendix A-1 - A-7 of *Amicus Curiae* brief filed by Amnesty International, which sets forth a list of 180 countries and their positions on capital punishment.[19] Most countries (143) prohibit capital punishment for juveniles. (App. 5 at p. 23a).[20] "[O]f the thousands of executions recorded by Amnesty International throughout the world between January, 1980 and May, 1986, only eight in [five] countries were reported to have been of people who were under 18 at the time of the crime. . .". Amnesty International, *The Death Penalty*, p. 74 (1987). The impact of the international community's consensus on the execution of juveniles is striking for two reasons. First, the universal rejection of capital punishment for juveniles transcends the political, geographic, eco-

[17] See *Thompson* v.*Oklahoma*, 108 S.Ct. at 2695-2696 n.30; App. 4 at pp. 21a-22a to petitioner's brief. Congress has recently amended § 408 of the Controlled Substances Act (21 U.S.C. 848) and has exempted persons under the age of 18 from imposition of capital punishment for certain drug related killings. 134 Cong. Rec. H11172 (10-21-88) and S7580 (6-10-88).

[18] Recent public opinion polls also reflect opposition to imposition of the death penalty on juveniles. See Streib, *Death Penalty for Juveniles*, 30-34.

[19] The petitioner has summarized their data in App. 5 at p. 23a.

[20] The United States has ratified one and signed two other international treaties which prohibit the death for any person who commits a crime under the age of 18. *Thompson*, 108 S.Ct. at 2696-2697 n.34 (plurality opinion).

nomic, cultural, racial and religious differences that otherwise separate the nations of the world. Second, it constitutes an objective indicia of society's evolving standards of decency.

The views of the international community and the majority of jurisdictions in this country are also shared by "respected professional organizations." *Thompson*, 108 S.Ct. at 2696 (plurality opinion). The American Law Institute's Model Penal Code contains a prohibition against capital punishment on persons under the age of 18 years at the time the offense was committed.[21] The National Council of Juvenile and Family Court Judges on July 14, 1988, passed Resolution No. 2 which opposed "capital punishment of those who committed an offense while under the age of eighteen years." The American Bar Association (ABA) also opposes the imposition of the death penalty on juveniles, (See *Thompson*, 108 S.Ct. at 2696 n.32), and *Amicus Curiae* brief filed in this case). The ABA's opposition to any juvenile death penalty is significant since it has not voiced unqualified opposition to the imposition of capital punishment on adults. (*Amicus* brief of ABA, p. 11).

The three objective criteria examined above thus support the conclusion that the imposition of capital punishment on juveniles contravenes "evolving standards of decency" and cannot be reconciled with the fundamental values held by our society.

2. Jury Determinations

Another "societal factor . . . in determining the acceptability of capital punishment . . . is the behavior of juries." *Thompson* v. *Oklahoma*, 108 S.Ct. at 2697; *Enmund* v. *Florida*, 458 U.S. at 3372. With regard to the imposition of capital punishment, "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." *Gregg*

[21] ALI Model Penal Code, § 210.6, Commentary at 133 (Official Draft and Comments, 1980); *Thompson* v. *Oklahoma*, 108 S.Ct. at 2696 n.33 (plurality opinion).

v. *Georgia*, 428 U.S. 153, 181 (1976). Thus, it is "important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker* v. *Georgia*, 433 U.S. at 596 (plurality opinion).

While juries infrequently impose the death penalty on adults, available data reflects that juries are even more reluctant to sentence a juvenile to death. Indeed, the infrequency with which the death penalty is imposed on juveniles creates not only a presumption of arbitrariness of any juvenile's death sentence but also demonstrates that contemporary society rejects the notion of the death penalty as an appropriate punishment for a juvenile.[22] Since 1890, juveniles (persons under 18 at the time of the offense) comprised 210 (2.5%) of the 8,544 persons executed in this country. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Clev.St.L.Rev. 363, 380—Table 2 (1986).[23] From "1982 through 1986 an average of 16,000 persons were arrested for . . . murder and non-negligent manslaughter each year." *Thompson*, 108 S.Ct. at 2697. Streib, *Death Penalty for Juveniles*, pp. 28-29, Table 2-2 (1987); App. 7 at pp. 25a-26a. Death sentences were imposed on 1.6% of the adults who were arrested on those charges. A significantly smaller percentage

[22] Notwithstanding the value of considering jury verdicts as a measurement of contemporary society's attitudes, it must be remembered that death penalty juries do not encompass a certain segment of the population that opposes capital punishment. As the *amicus* brief filed by NLADA and NACDL (pp. 10-11, n.5) correctly notes, death penalty juries exclude those citizens whose opposition to capital punishment renders them unqualified for jury service under the standards enunciated in *Wainwright* v. *Witt*, 469 U.S. 412 (1985) and *Lockhart* v. *McCree*, 476 U.S. 162 (1986).

[23] Since January, 1977, three males have been executed for crimes committed when they were under 18 years of age. One (Charles Rumbaugh, age 17 - Texas) volunteered for execution. The other two juveniles (James Roach, age 17 - South Carolina and Jay Pinkerton, age 17 - Texas) apparently did not challenge the constitutionality of the death penalty for persons who were under the age of 18 years at the time the offense was committed. See Streib, *The Eighth Amendment and Capital Punishment for Juveniles*, 34 Clev.St.L.Rev. at 381; Streib, *Death Penalty for Juveniles*, 121-130; Brief of *Amicus Curiae*, Collateral Capital Representative at pp. 29-30 n.67.

(.04%) comprised the number of juveniles who received the death penalty. From 1982 through the end of 1987, 1,731 persons were sentenced to death. (App. 6 at p. 24a). During that same period of time, death sentences were imposed on 40 juveniles. (App. 7 at pp. 25a-26a).[24] Juveniles thus comprise approximately 2.3% of those persons sentenced to death from 1982 through 1987. There are presently 2,110 persons under a sentence of death in the United States. Of that number, 31 (29 males and 2 females) are juveniles.[25] Thus, juveniles comprise approximately 1.46% of the total death row population. This data reflects a difference in the way juries recommend the imposition of capital punishment on juveniles and adults and supports the conclusion that contemporary sentencing juries reject the death penalty as an appropriate sentence for a youth who was under 18 at the time of the offense.

Kentucky has not executed a person who was under the age of 18 at the time the offense was committed since 1945. There have been seven juvenile executions in Kentucky in this century: four were for rape—two were for murder— and one involved multiple murders and rape. Streib, *Death Penalty for Juveniles*, 196. Since *Furman* v. *Georgia*, 408 U.S. 238 (1972), only two Kentucky juveniles, the petitioner and Todd Ice, have been sentenced to death.[26] Ice's sentence and conviction were

[24] Professor Streib supplied counsel for the petitioner with information that two juveniles (Troy Dugar, age 15 - Louisiana and Wilbur Lamb, age 17 - Florida) were sentenced to death in 1987. See App. 7 at pp. 25a-26a. Two juveniles (Paula Cooper and Troy Dugar) listed in App. 7 at p. 26a, appear to fall within the parameters of *Thompson* v. *Oklahoma* because they were 15 yrs. old at the time of their crimes which occurred in states that did not then set a minimum age for the imposition of capital punishment (Indiana and Louisiana, respectively). See *Thompson*, 108 S.Ct. at 2695-2696 n.26 and n.30. Those death sentences should therefore be vacated.

[25] LDF, Death Row, U.S.A. (8-1-88).

[26] In recent years four other juveniles in Kentucky have faced the possibility of capital punishment. Three of them were allowed to plead guilty to sentences less than death. (Robert Green (age 16) and Alvin Forrest (age 17)-Jefferson County, Indictment 159102 and Pearl Stepp (age 14)-Harlan County, Indictment No. 78CR001). The fourth juvenile, Tommy Bowling, was

reversed. *Ice* v. *Commonwealth*, Ky., 667 S.W.2d 671 (1984). On retrial, Ice was convicted of first degree manslaughter and sentenced to 20 years imprisonment.[27] Kentucky's experience demonstrates that contemporary society rejects the death penalty as an appropriate sentence for juveniles.

The history of our country's treatment of juveniles, society's recognition of the substantial differences between juveniles and adults, and examination of the objective criteria for determining evolving standards of decency, support the conclusion that imposition of capital punishment on a person who was under 18 at the time of the crime violates the Eighth and Fourteenth Amendments.

B. Legitimate Objectives Of Punishment Are Not Served By The Execution Of Persons Who Were Under The Age Of 18 At The Time Of The Crime.

"The death penalty serves two principal social purposes: retribution and deterrence of capital crimes by prospective offenders". *Gregg* v. *Georgia*, 428 U.S. at 183. "Unless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund* v. *Florida*, 458 U.S. at 798 citing *Coker* v. *Georgia*, 433 U.S. at 592. The expressed objectives of capital punishment are not served by the execution of a youth who was under 18 at the time of the crime.

1. Deterrence

That contemporary juries seldom impose the death penalty on juveniles is "a fact which further attenuates its possible

---

tried by a jury in Powell County (Indictment No. 79CR025) and was sentenced to 20 years imprisonment. Bowling's adult half-brother was tried separately and sentenced to death. See *White* v.*Commonwealth*, Ky., 671 S.W.2d 241 (1984). See *Amicus Curiae* brief filed by Kentucky Youth Advocates et al. in *Eddings* v. *Oklahoma*, 80-5727, p. 10, n.6.

[27] See Louisville Courier-Journal, February 25, 1986.

utility as an effective deterrence." *Enmund*, 458 U.S. at 800. There is no deterrence from the fact that capital punishment for juveniles is authorized by some states, because there is only a remote possibility that it will become a reality. Indeed, the plurality in *Thompson*, noted the lack of deterrent value that the death penalty has on juveniles. *Id.* 108 S.Ct. at 2700. See also Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind.L.J. 757, 788-790 (1986).

The deterrence rationale for a juvenile death penalty is nonexistent because juveniles, as a class, display an absence of fear and appreciation of the long-term consequences of their actions. Those latter characteristics are hardly surprising in light of the "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Thompson*, 108 S.Ct. at 2698. Indeed, those characteristics are by-products of the emotional and psychological immaturity so common among adolescents. Normal adolescence is a time of life marked by an absence of fear which is fueled by the adolescent's own sense of invulnerability. Caught between adulthood and childhood, they inevitably wrestle with their own identities and engage in conduct that is marked by a lack of judgment and psychological and emotional immaturity. Adolescents frequently try to prove their adulthood by exhibiting childlike behavior, often with fatal consequences.[28] "The adolescent lives in an intense present; 'now' is so real to him that past and future seem pallid by comparison." *Id.* 108 S.Ct. at 2699 n.43 citing Kastenbaum, *Time and Death in Adolescence*, in *The Meaning of Death*, 99, 104 (H. Feifel ed. 1959). "'Risk-taking with body safety is common in the adolescent years, through sky diving, car racing, excessive use of drugs and alcoholic beverages. . . .'" *Thompson*, 108 S.Ct. at 2699 n.43 citing

---

[28] For example, teenagers comprise a disproportionate number of alcohol-related traffic accidents as compared to the rest of the population. See remarks of Sen. Bumpers, 130 Cong. Rec. - Senate 8239 (June 26, 1984); Sen. Huddleston, *Id.* at 8241; and Sen. Chafee, *Id.* at 8243.

Gordon, *The Tattered Cloak of Immortality*, in *Adolescence and Death*, 16, 27 (C. Coor and J. McNeil eds. 1986). The fear of death thus has little, if any, deterrent value to adolescents not only in terms of the criminal justice system but also as a matter of everyday life.

Society does not expect juveniles to exercise the same rational and reasoned judgment expected of adults. By its laws, society has codified and underscored the cognitive, psychological, emotional, and developmental differences between adults and juveniles. This recognition of the causes and effects of adolescent behavior, as well as the infrequency with which juveniles are sentenced to death and executed, renders the deterrence rationale for capital punishment inapplicable to juveniles who are under 18 at the time the crime was committed.

2. Retribution

Retribution "as an expression of society's moral outrage at particularly offensive conduct" is not a "forbidden objective" of our society. *Gregg* v. *Georgia*, 428 U.S. at 183. However, the degree of retribution is to be commensurate with the individual's own culpability. *Enmund* v. *Florida*, 458 U.S. at 798-800. "Adolescence is well recognized to be a time of physiological and psychological change and stress. Normal adolescents are distinguished from adults by their intensity of feeling, immature judgment, and impulsiveness." Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145, Am. J. Psychiatry, 584-588 (May, 1988). See also Streib, *Death Penalty for Juveniles*, 184-185. These characteristics of "normal" adolescents are surely exacerbated in juveniles who have, like the petitioner, experienced severe emotional deprivation and neglect from a parent throughout their lives. Adolescence is conservatively viewed as lasting from the age of 11 through 18. Hamburg and Wortman, *Adolescent Development and Psychopathology*, in *Psychiatry* 5-8 (J. Cavener ed. 1985). Thus, the internal and external pressures that are brought to

bear on a youth are not fleeting but endure throughout a substantial portion of that young life. Society's strict regulation of the lives of juveniles is a recognition that they are subjected to the psychological and emotional characteristics of adolescence for a number of years and can be expected to act accordingly. The imposition of the death penalty, society's most extreme sanction, is therefore inconsistent with the recognized effects and consequences of adolescent behavior.

This Court has emphasized the importance of youth as a reason to spare a juvenile's life because they are less mature and thus less responsible for their acts than adults. *Eddings*, 455 U.S. at 115-116. See also Note, 61 Ind.L.J. 757, 785-788 (1986). Juveniles are more vulnerable to influence, peer pressure and psychological damage. They are more impulsive. Our socio-economic and educational system as well as home and family environment share the responsibility for the behavior of juveniles. *Eddings*, 455 U.S. at 115 n.11 citing Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, 7 (1978). Thus, "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson* 108 S.Ct. at 2698 (footnote omitted).

Juveniles are less responsible for their acts than adults because they "are less mature in their ability to make sound judgments" and "less mature in terms of their moral development . . ." and "are less able to control their conduct and to recognize the consequences of their acts than are adults." 74 *J.Crim.L. and Criminology* 1471, 1493 (1983). Society bears a greater responsibility for the crimes of minors than for those of adults. The main characteristic shared by juveniles who commit serious crimes is membership in a family that provides inadequate supervision and guidance and in which there are conflicts, disharmony and poor parent-child relationships. *Id.* at 1495 (footnote omitted). An adult is better situated to eliminate or diminish the factors that contribute to criminal behavior than a juvenile who is less capable of extricating

himself from his immediate environment because he is dependent upon his family and the social system for his everyday existence. If either or both of these entities contribute to a juvenile's behavior, age makes it impossible for the juvenile to break the cycle. A juvenile's lack of maturity and underdeveloped ability to reason and respond rationally to stressful situations serve only to exacerbate a difficult living situation and may thus prompt criminal behavior.

Transfer of a juvenile's case to adult court does not necessarily mean that a juvenile is considered to be as morally accountable as an adult or that society is any less responsible for the juvenile's criminal conduct. It is neither a statement that a juvenile is beyond rehabilitation "[n]or is it evidence that the minor is more mature than his peers or is able to control his conduct and understand the consequences of his actions." *Id.* at at 1499. Transfer decisions "reflect the inadequacies of the system" (*Id.* at 1500) and cannot be premised on the assumption that the juvenile should be subjected to capital punishment, especially where the juvenile, like the petitioner, is amenable to treatment and rehabilitation.[29] This conclusion is consistent with the recognition that "incorrigibility is inconsistent with youth". *Workman* v. *Commonwealth*, Ky., 429 S.W.2d 374, 378 (1968). In *Workman*, the imposition of a sentence of life without parole on a 14 year old boy who was convicted of rape, constituted cruel and unusual punishment. The same conclusion was reached with regard to a 16 year old boy. *Anderson* v. *Commonwealth*, Ky., 465 S.W.2d 70 (1971). The ruling was not extended to adults because "juveniles have historically been labeled as a separate class." *Fryrear* v. *Commonwealth*, Ky., 507 S.W.2d 144, 146 (1974). "[I]t is impossible to make a judgment that a [juvenile], no matter how bad, will

[29] In the order transferring jurisdiction to adult court, the juvenile court judge noted the petitioner's "chaotic family life and lack of treatment". The judge found the petitioner "emotionally immature" and "amenable to treatment". (J.A. 9). He further found that appropriate treatment programs for the petitioner existed only outside of Kentucky but he lacked the "statutory basis to order the state to provide such institutionalization. . ." . (J.A. 10).

remain incorrigible for the rest of his life." *Workman*, 429 S.W.2d at 378. "It seems inconsistent that one would be denied the fruits of the law, yet subjected to all its thorns." *Id.* at 377.

The "possibility of significant character and behaviorial changes in young adults ages eighteen to twenty-five is a recognized phenomenon". 74 *J.Crim.L. and Criminology* at 1514. (Citation omitted). "For most adolescents age alone is the cure of criminality." F. Zimring, *Background Paper*, in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime*, at p. 37 (1978); J. Wilson and R. Herrnstein, *Crime and Human Nature*, 144 (1985). Thus, a lengthy prison term is adequate retribution for the crimes committed by juveniles because the recidivism rate for juvenile murderers is "very low" and they "tend to be model prisoners."[30]

Juveniles are not only less morally culpable than adults but also are susceptible to the influence of peer groups and pressures. *Thompson*, 108 S.Ct. at 2699.[31] Thus, the death penalty for juveniles does not advance the objectives of deterrence and retribution and does not make any "measurable contribution to acceptable goals of punishment." *Coker* v. *Georgia*, 433 U.S. at 592 (plurality opinion); *Enmund* v. *Florida*, 458 U.S. at 798.

The deterrence and retribution justifications for the death penalty are especially inapplicable in the petitioner's case. Society, by its considered judgment, has established the age of 18 as the boundary between childhood and adulthood. Seventeen year olds, like the petitioner, fall on the childhood side of the dividing line. By society's standards, he is a child, not an adult. He manifests the same qualities of adolescents as younger juveniles. He is vulnerable, immature, susceptible to the

[30] Streib, Eighth Amendment and Capital Punishment for Juveniles, 34 Clev.St.L.Rev. at 395.

[31] Indeed, the petitioner became involved in the crime only after he was contacted by David Buchanan who, along with Troy Johnson, planned the robbery and obtained the gun with which to commit it. (TE VII, 1030-1034).

psychological influences of his family and peers, and a product of his upbringing and his home environment.

The petitioner's immaturity was specifically recognized by the juvenile court which also acknowledged his "chaotic family life" (J.A. 9), to which the State routinely returned him following each placement in a juvenile facility. The juvenile court noted that the county and the state failed "to provide meaningful therapy for the [petitioner] or after-care intervention." (J.A. 9). In each juvenile facility placement, the petitioner met "the minimal criteria for release". (J.A. 9). He was then "cut loose to the same chaos and streets that he was not able to deal with, still without social skills, still delinquent and still uneducated." (J.A. 9).

The petitioner's chaotic home life began at an early age. There is no mention in the record about his natural father. The petitioner spent his early years living with other relatives which caused him to become confused as to who was really his mother. (TE X, 1440-1442). His mother's absence from the home deprived him of the basic nurturing and bonding that children need with their parents. (*Id.* 1411, 1440-1442). His early childhood was a lonely and isolated existence that impaired his ability to develop social relationships. (*Id.* 1407-1408, 1440-1442). The petitioner's aunt recognized the problems existing in the relationship between the petitioner and his mother. (*Id.* 1430-1431). The psychological influence and emotional deprivation that the petitioner necessarily experienced from his mother's neglect resulted in "a lifetime of rejection". (*Id.* 1447-1448). The relationship between the petitioner and his mother was described as "dysfunctional". (*Id.* 1408).

Thus, the petitioner lacked what every child needs, loving and supportive parents who provide guidance and stability. His mother's neglect and rejection obviously left the petitioner with an emotional and psychological void. He was caught in a vicious circle from which he could not escape. He would be placed in a juvenile facility that would fail to provide him with

any meaningful treatment (J.A. 9) and upon his release he returned to a "chaotic family life". (J.A. 9). Mr. Mattison and Mr. Berry noted the lack of cooperation and support given to the petitioner by his mother while he was in their Employment Skills Project. (*Id.* 1408-1409, 1424-1425). Whatever progress the petitioner made in treatment programs was destined to fail because of his home environment. As an adolescent, the petitioner was not emotionally or psychologically equipped to handle the internal stress necessarily engendered by the dysfunctional relationship with his mother. His increasing drug abuse is a typical adolescent response to his environment. (*Id.* 1412, 1432, 1441-1442).

In spite of this background, the petitioner still manifested the amenability to treatment and rehabilitative potential recognized by the juvenile court. (J.A. 9-10). When Linda Luking began counseling the petitioner in the Juvenile Detention Center, he was difficult to work with and resisted her efforts. (*Id.* 1443). When she persisted and gave the petitioner the attention and guidance that he needed, he responded as any adolescent would, he blossomed. There was a noticeable change in his behavior. His schoolwork improved. He began doing extra reading and wrote for the newsletter. He demonstrated interest in the GED program and volunteered to participate in various projects. (*Id.* 1444-1445). The petitioner's development is a manifestation of his adolescence. Even at the age of 17, he shared traits common to all other adolescents and responded to his problems and environment in an adolescent fashion. While adolescence may be a transitional period, it is not adulthood. Society has drawn a bright, dividing line between juveniles and adults. Thus, the imposition of capital punishment on a juvenile who is under 18 at the time of the crime was committed is excessive and disproportionate and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment.

C. The Petitioner's Death Sentence Violates The Eighth And Fourteenth Amendments Because Juveniles Who Are Transferred To The Adult Court System And Ultimately Face Capital Punishment Are Not Afforded Sufficient Due Process To Protect Them Against the Arbitrary Imposition Of The Death Penalty.

The petitioner urges the Court to rule that the Eighth and Fourteenth Amendments prohibit the imposition of capital punishment on a juvenile who was under 18 at the time of committing a crime. Any doubts the Court may have about whether the line should be drawn at 18 or whether 17 year olds should be treated like adults for capital punishment purposes evaporate when present statutes and procedures are examined. The Court must insist on strict standards and procedural safeguards to avoid arbitrary imposition of the death penalty. Since society treats 17 year olds as juveniles, the Court cannot categorically place them under the umbrella of adulthood for purposes of capital punishment. There is substantial doubt about whether a 17 year old can be treated as an adult because he is still in the stage of adolescence in which significant emotional and psychological development occurs. It is well-recognized that the cognitive skills and maturity of juveniles are not the same as those of adults. The doubts must be resolved in the juvenile's favor and constitute the rationale for augmenting the constitutional protections afforded the juvenile in capital sentencing proceedings.

As the petitioner's case demonstrates, the protections given adolescents by the juvenile justice system evaporate when they are thrust into adult court. The due process safeguards at work in the adult justice system are inadequate to protect juveniles because they fail to draw any distinctions between adults and juveniles. Society treats juveniles as a class and not as individuals when it comes to laws governing their behavior. For example, a juvenile under the age of 18 cannot vote under any circumstances. His ability to vote is not dependent upon his maturity, level of intelligence, or his moral and emotional development. The law is inflexible, absolute, and its application

cannot be waived by individual circumstances. The same is true of other laws which restrict the ability of juveniles to engage in certain conduct. (See App. 3a-c at pp. 17a-20a).

Death penalty jurisprudence demands an "individualized consideration" of the facts and circumstances surrounding the accused and the offense in order that an appropriate sentence can be imposed. *Enmund* v. *Florida*, 458 U.S. at 798 citing *Lockett* v. *Ohio*, 438 U.S. at 605. Thus, the linchpin of death penalty jurisprudence runs contrary to the approach society has taken in its treatment of juveniles. This fundamental inconsistency should be resolved in favor of banning capital punishment for juveniles who are under 18 at the time they commit the crime because the adult justice system does not afford juveniles adequate due process safeguards against the arbitrary imposition of capital punishment.

The accused's ability to present mitigating evidence is the primary safeguard against arbitrary imposition of the death penalty. For example, Kentucky specifies "[t]he youth of the defendant at the time of the crime" as a mitigating circumstance. KRS 532.025(2)(b)(8). This mitigating circumstance is a hollow safeguard because a juvenile is not statutorily afforded any more consideration than is any other young person. "[G]reat weight"[32] must be given to "the special mitigating factor of youth,"[33] But the special status of youth as a mitigating circumstance is lost in the plain language of death penalty statutes like Kentucky's.

"Youth" as it is used in KRS 532.025(2)(b)(8) is not an absolute term. It necessarily operates on a sliding scale and applies with equal force to a defendant who is 16 years old as well as to a 30 year old defendant. No legal distinction is made between those two defendants and all those between their ages. Thus, jurisdictions like Kentucky which specify youth as a mitigating circumstance do not afford juveniles adequate due process

---

[32] *Eddings* v. *Oklahoma*, 455 U.S. at 115-116.

[33] *Thompson* v. *Oklahoma*, 108 S.Ct. at 2698 (plurality opinion).

protections which are warranted by their age.[34] These statutes undercut the importance of a juvenile's age as mitigation. Rather than being the significant, pervasive factor of the case, the juvenile's age shares the same status as any other mitigating circumstance. Indeed, it has been held that a defendant's young age "is not a constitutional distinction" between juveniles and adults. *Ice* v. *Commonwealth*, 667 S.W.2d at 680. Such a ruling is inconsistent with the *Eddings*' requirement that a juvenile's age carry "great weight" as mitigation. If a mitigating circumstance treats juveniles as young adults, then it ignores the true essence of youth.

Whatever protection may be afforded juveniles in the states which list "youth" as a mitigating circumstance is further diluted in those states which either provide that the defendant's "age" is a mitigating factor[35] or do not specifically enumerate mitigating circumstances.[36] In the latter six jurisdictions, the juvenile's age has no particular significance as a mitigating circumstance. In the ten states where "age" is a mitigating factor, juveniles share equal footing with young adults and elderly defendants whose advanced age can also be considered as mitigating evidence. Thus, these capital punishment statutes are constitutionally infirm because they do not provide for due consideration of the "great weight" that a juvenile's age is to carry as a mitigating circumstance.[37]

The petitioner's case presents a compelling example of how "youth" as a mitigating factor can be rendered meaningless by

---

[34] See App. 8 at p. 27a. Of the 8 states which list youth as a mitigating circumstance only Indiana, Montana, and South Carolina specifically require consideration of the defendant's age if he was less than 18 at the time of the crime.

[35] See App. 9 at p. 28a.

[36] See App. 10 at p. 29a.

[37] Indeed, the Kentucky Supreme Court did not afford the petitioner's age any more consideration than any other mitigating factor. "[The petitioner's] age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him." *Stanford* v. *Commonwealth*, 734 S.W.2d at 792. (J.A. 136).

the exclusion of mitigating evidence that is designed to show his rehabilitation potential in the adult penal system. The trial judge in this case excluded penalty phase testimony from Robert Jones, a former death row inmate in Kentucky. (TE X, 1498; J.A. 87).[38] After his release from prison, Jones worked as a youth counselor at the Juvenile Detention Center in Louisville and became acquainted with the petitioner several years *before* his arrest in this case. Jones also spoke with the petitioner about a month prior to his trial in the case at bar. (TE X, 1489-1491; J.A. 76, 79). Jones testified about the educational, vocational, and rehabilitative programs offered by the adult penal system in Kentucky and, based upon his knowledge of the petitioner, believed that he could benefit from those programs. (TE X, 1491-1497; J.A. 80-85).

The Kentucky Supreme Court upheld the exclusion of Jones' proffered testimony because "He had no academic or professional qualifications to allow him to offer opinion evidence. His personal knowledge of [the petitioner] was at best minimal and remote. What very little of his testimony which might conceivably be admissible, such as the rehabilitative prospects of the defendant, was cumulative." *Stanford* v. *Commonwealth*, 734 S.W.2d at 790 (J.A. 130-131). This restrictive view of mitigating evidence is inconsistent with the principles espoused in *Lockett* and *Eddings*.

The accused's capacity for rehabilitation must be admitted as mitigating evidence. *Hitchcock* v. *Dugger*, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Moreover, "academic or professional credentials" are not the only measure of one's expertise. Expertise "can be acquired by acquaintance with, or observation of, the subject matter"[39] or by actual experience.[40]

---

[38] Jones was not permitted to testify before the jury. Kentucky Rule of Criminal Procedure (RCr) 9.52 provides for a procedure known as an avowal in which testimony, to which an objection is made, is presented to the trial court outside the presence of the jury for the trial judge's consideration and for review by an appellate court.

[39] *Lee* v. *Butler*, Ky. App., 605 S.W.2d 20, 21 (1979).

[40] *Kentucky Power Co.* v. *Kilbourn*, Ky., 307 S.W.2d 9, 12 (1957).

Under *Lockett*, *Eddings* and *Hitchcock*, Jones' testimony cannot be excluded even if it was "minimal and remote".[41] The juvenile court's transfer order acknowledged the petitioner's rehabilitative potential. (J.A. 9-10). However, the arbitrary restriction on the presentation of mitigating evidence, stripped the petitioner of the ability to fully apprise the jury of that potential and thereby unfairly hampered his efforts to ensure that his youth was given due consideration by the jury.

Adult courts are ill-equipped to provide the strict review warranted by juvenile cases. Transfer to adult court strips the juvenile of his special status and provides nothing in return. This reality is in and of itself a reason why stricter constitutional safeguards must be implemented in proceedings which could expose 17 year olds to capital punishment. The fundamental differences between juveniles and adults are lost when a juvenile enters the adult court system which offers little or no protection from the arbitrary imposition of capital punishment. Safeguards such as mitigating circumstances are illusory protections because they provide no special treatment for a juvenile's case and do not achieve a constitutionally sufficient level of individualized consideration because they apply with equal force to juveniles and adults.

Abolition of the death penalty for juveniles, as a matter of Eighth Amendment jurisprudence, is consistent with society's theory and practice of dealing with juveniles and ensures that

---

[41] Even an individual who has "minimal" knowledge of an accused's character or record, can offer mitigating evidence in the penalty phase of a capital trial. A witness may testify as to an unusual act of heroism or kindness by the accused and even if that individual's contact with the accused in that one instance lasts no more than a few seconds or minutes, it may well constitute the type of evidence that a jury would take into consideration for the imposition of a sentence less than death.

Similarly, remoteness is an inherently unjustifiable basis upon which to exclude mitigating evidence. If such a rule were to apply, then evidence as to the accused's upbringing and childhood would be excluded as being remote to the time when he is on trial as an adult. It is a matter of common knowledge that what an individual experiences as a child ultimately shapes his life as an adult. *Eddings* v. *Oklahoma*, 455 U.S. at 115-116.

the fundamental differences between juveniles and adults are taken into account when a juvenile case is transferred to adult court.

D. State Statutes Pertaining To The Transfer Of Juvenile Cases To Adult Courts Are Constitutionally Deficient Because They Do Not Specify What Burden Of Proof Applies.

Juvenile transfer proceedings must provide a certain degree of constitutional due process. *Kent* v. *United States*, *supra*. A crucial due process shortcoming in most transfer statutes is their failure to articulate any particular burden or standard of proof that must be established before a juvenile can be transferred to adult court. Only five states set forth any burden of proof regarding the criteria for transfer.[42] Kentucky and seven other states merely require a showing of probable cause to believe the juvenile committed the crime and no particular evidentiary standard is ascribed to the transfer criteria.[43] Eleven states do not list any standard of proof for the transfer of juvenile cases to adult courts.[44]

Juveniles who face capital punishment do so by operation of juvenile transfer statutes that lack any meaningful standards to guide the juvenile court's decision of whether to transfer the case to adult court. Those statutes are constitutionally deficient insofar as they fail to articulate an evidentiary standard or burden of proof on whether the transfer criteria have been met and whether the case should be transferred even if the transfer criteria have been established. Thus, juveniles, like the petitioner must bear the risk that an error is made either in

---

[42] See App. 11 at pp. 30a-31a. Mississippi requires that the transfer criteria be proved by clear and convincing evidence. The other jurisdictions (Georgia, Louisiana, Montana and Pennsylvania) merely require that the transfer criteria be established by probable or reasonable cause.

[43] See App. 12 at p. 32a.

[44] See App. 13 at p. 33a.

the decision to transfer jurisdiction of his case or the ultimate decision to impose the death penalty.

A uniform standard of proof is constitutionally necessary to ensure that transfer decisions are based on identifiable criteria that are weighed and considered in a manner that engenders confidence in the reliability of the proceeding and its outcome. In criminal cases, the interests of the accused "have been protected by standards of proof designed to exclude . . . the likelihood of an erroneous judgment." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979). Consequently, the reasonable doubt standard has been utilized because "our society imposes almost the entire risk of error upon itself." *Id.* To eliminate the potential for arbitrariness in transfer decisions, due process requires that the reasonable doubt standard be implemented in transfer proceedings since it is the most effective means of reducing the margin of error which exists in all litigation because it requires the prosecution to shoulder the burden of persuading the fact-finder. *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958); *In re Winship*, 397 U.S. 358, 364 (1970).

The "qualitative difference" between the death penalty and any other sentence calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U.S. at 604. This enhanced level of reliability must exist not only at trial when a juvenile faces capital punishment but also must extend to the determination of whether he should be transferred to adult court in the first place. Society must be willing to bear the risk of error and adopt a standard of proof in transfer proceedings that is designed to enhance the reliability of the transfer decision and eliminate arbitrariness in the outcome. Accordingly, due process requires that the State prove beyond a reasonable doubt that the criteria for transfer have been met and that the interests of the juvenile are served by a transfer to adult court.

In the petitioner's case, the juvenile court's transfer order leaves no doubt that it could not be shown beyond a reasonable doubt that he had an adult-level of maturity and was not amenable to treatment. (J.A. 9). Consequently, it was unconstitutional to expose him to the risk of capital punishment even if his case was transferred to circuit court. The due process safeguards created by application of the reasonable doubt standard should not be restricted to whether the criteria for transfer have been met in juvenile court but should also extend to the penalty phase of a capital trial.[45]

To ensure that the risk of error is not borne by the juvenile, the jury must make findings concerning his amenability to treatment as well as his maturity and level of emotional and intellectual development. This procedure would ensure that juries understand the importance of youth as a mitigating circumstance and take into account the qualitative difference between juveniles and adults. The petitioner's case is a graphic example of the accused bearing the risk of error that the transfer determination and the imposition of the death penalty are erroneous.

As noted earlier, "youth" as a mitigating circumstance is a hollow safeguard because it applies with equal force to young adults. This problem is exacerbated in the petitioner's case because the jury made no written findings concerning the existence or non-existence of mitigating circumstances. (J.A. 103-104). Thus, it is impossible to tell what, if any, weight the jury ascribed to the mitigating circumstances (J.A. 99-102),[46] and the petitioner is forced to bear the risk of error.

---

[45] Indeed, the petitioner should at least be protected in a capital trial by a presumption that the death penalty is inappropriate because of his age and the jury should be instructed on that presumption.

[46] The petitioner tendered instructions that required the jury to make written findings as to whether or not the mitigating circumstances existed (J.A. 97) but they were not given by the trial court. (J.A. 99-104). Kentucky law does not require the jury to make written findings on whether mitigating circumstances exist or do not exist. *Smith* v. *Commonwealth*, Ky., 599 S.W.2d 900, 912 (1980). However, that ruling is inconsistent with *Eddings* v. *Oklahoma*, 455 U.S. at 116 which requires that all relevant mitigating evidence be considered and weighed against the aggravating circumstances. Written findings are the only way to ensure that the finder of fact has performed this balancing test.

The petitioner also bore the risk of error in the proportionality review conducted by the Kentucky Supreme Court [KRS 532.025(3)(c)], which was fatally flawed because with one exception,[47] the petitioner's case was compared to cases involving adult defendants. *Stanford* v. *Commonwealth*, 734 S.W.2d at 793 and n.9; J.A. 137-138. The sparse information provided by the Kentucky Supreme Court in its proportionality review suggested that the predominant factor was the nature of the crime and that aggravating and mitigating circumstances in all the cases were considered and compared. *Id.*[48] A comparison to adult cases suggests that the petitioner's age was not given the "great weight" it was intended to carry and that the qualitative differences between adults and juveniles were ignored.[49] The comparison to the only other juvenile death penalty case, *Ice* v. *Commonwealth*, was meaningless because the bases of comparison were unidentified and unknown. Thus, the petitioner was forced to bear any risk of error in the comparison of capital cases.

The petitioner was also made to bear the risk of error that Kentucky's transfer statute (KRS 208.170) was being applied in a racially discriminatory manner. At a hearing in the circuit court, the petitioner presented evidence that showed that black juveniles were being treated more harshly than white juveniles by the juvenile justice system in Jefferson County. The petitioner introduced evidence which showed that between 1975 and 1979, 69.4% (27,066) of the total number of referrals to juvenile court were white youths and that 30.6%

[47] *Ice* v. *Commonwealth*, Ky., 667 S.W.2d 671 (1984).

[48] There is no indication of the methodology used by the Kentucky Supreme Court in its consideration and comparison of the mitigating and aggravating circumstances.

[49] Indeed, the Kentucky Supreme Court's opinion suggests that it paid mere lip-service to the petitioner's age as a mitigating circumstance. "His age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him." *Stanford* v. *Commonwealth*, 734 S.W.2d at 792; J.A. 136.

(11,914) were black youths. (J.A. 28-29; App. 2b at p. 12a).[50] Of the total number of cases referred to juvenile court, the cases of 10,596 (39.1%) white juveniles were handled informally as opposed to the cases of 3,228 (27.1%) black juveniles. (J.A. 30-31; App. 2c at p. 14a).[51] The cases of 16,470 (60.9%) white youths were handled by formal disposition in juvenile court as compared to cases of 8,686 (72.9%) black youths. (App. 2c at p. 14a). There were 56 grand jury referrals during the five year period, 18 of which were white juveniles (32.1%) and 38 were black juveniles (66.9%). (J.A. 31-32; App.2b-2e at pp. 12a-17a). The petitioner's evidence indicated that the cases of black youths were submitted to the grand jury in a disproportionate ratio to the number of total referrals of black youths to the juvenile court. Yet, blacks accounted for the majority of offenders in only two of nine major felony categories (Homicide, 57.4% and Robbery, 58.1%; J.A. 32-35; App. 2a at p. 11a).

The Kentucky Supreme Court found the evidence about the racial disparity in grand jury referrals to be "disturbing", but did not believe that the evidence warranted "the conclusion that race is in any way a factor in the waiver process." (*Stanford* v. *Commonwealth*, 734 S.W.2d at 791; J.A. 133). Thus, the petitioner bore the risk of error as to whether the juvenile transfer statute was being applied in a racially discriminatory manner.

The absence of any evidentiary standard in transfer proceedings forces the juvenile to assume the risk of error. The case at bar demonstrates the compelling need for the Court to impose the reasonable doubt standard on transfer proceedings involving a juvenile who faces capital punishment when his case is

[50] The 1970 census indicated that the population of Jefferson County, Kentucky was 14% black and 86% white. United States Bureau of Census, Census of Population, 1970, Part 19—Kentucky, Table 16 (p. 19-45) and Table 24 (p. 19-70).

[51] An informal disposition is one in which the juvenile meets with a court worker and the matter is handled on an informal basis and never is referred to court for a formal hearing. (J.A. 31).

transferred to an adult court. The absence of this safeguard renders the petitioner's death sentence arbitrary and capricious in violation of the Eighth Amendment.

E. Since The Petitioner Was Found Amenable To Treatment By The Juvenile Court, Due Process Requires That He Not Be Subjected To Capital Punishment.

The juvenile court transfer order stated (J.A. 9-10):

> [The petitioner] is emotionally immature and could be amenable to treatment if properly done on a long-term basis of psychotherapeutic intervention and reality-based therapy for socialization and drug therapy in a residential facility . . . the only facilities for a youth . . . of his age with his problems would be out-of-state placement in specialized long-term programs for youth . . . However, the court lacks statutory basis to order the state to provide such institutionalization for the length of time sufficient to provide such intervention reasonably calculated to provide rehabilitation . . .

Due process requires that the State not execute a juvenile who is deemed amenable to treatment but for whom the State offers no appropriate treatment program. Imposition of the death penalty in such a situation is indeed arbitrary especially where, as here, a treatment program does exist but it is not in the state of which the juvenile is a resident. Treatment cannot be denied simply because a state lacks the funds or the facilities to provide them to a needy juvenile. *Cf. Haziel* v. *United States*, 404 F.2d 1275 (D.C. Cir. 1968).[52]

---

[52] Kentucky is a poor state ranking 44th in *per capita* income and 45th in *per capita* taxes paid to state and local governments. Moreover, just slightly more than 50% of all adults in Kentucky have a high school education. This percentage is the lowest in the nation. See The Louisville Courier-Journal Magazine, Sunday, November 27, 1988, p. 14. Consequently, there is an element of arbitrariness inherent in the petitioner's case because his status as a resident of a poor state prevents him from receiving appropriate treatment to which he is amenable. The petitioner's execution is Kentucky's response to the State's inability to provide him with an appropriate treatment program.

The "right to treatment" doctrine "finds its basis in the due process clause of the Fourteenth Amendment." *Morales* v. *Thurman*, 364 F. Supp. 166, 175 (E.D. Tex. 1973) "The right to rehabilitative treatment for juvenile offenders . . . has been established in state and federal courts in recent years." *Nelson* v. *Heyne*, 491 F.2d 352, 358 (7th Cir. 1974). See also *Inmates of Boy's Training School* v. *Affleck*, 346 F.Supp. 1354 (D.R.I. 1972); *Morgan* v. *Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Pena* v. *New York State Division for Youth*, 419 F. Supp. 203 (S.D. N.Y. 1976); and *Collins* v. *Bensinger*, 374 F. Supp. 273 (N.D. Ill. 1974). Thus, a juvenile's right to treatment is an accepted principle of constitutional law and due process requires that Kentucky provide the petitioner with the treatment to which he is amenable and preclude his execution.

It is indeed a cruel twist of fate for Kentucky to fail to provide the petitioner with ' meaningful therapy" or "after-care intervention" (J.A. 9), which eventually results in his transfer to adult court, and then seek to exact society's ultimate sanction from him because it failed to provide him with appropriate treatment. The imposition of the death penalty is arbitrary and constitutes cruel and unusual punishment, particularly when it is imposed on a juvenile, like the petitioner, who is deemed amenable to treatment but has never been given the opportunity to avail himself of the rehabilitation offered to adults by the justice and correctional systems. "[T]he extinction of all possibility of rehabilitation is one of the aspects of death that makes it different in kind from any other sentence a State may legitimately impose". *Gardner* v. *Florida*, 430 U.S. 349, 360 (1977). The petitioner's case is not one in which all possibility of rehabilitation has been extinguished. Thus, his death sentence is arbitrary and must be vacated.

F. At The Time The Petitioner's Case Was Transferred To Circuit Court, Kentucky Did Not Have A Minimum Age For Imposition Of The Death Penalty. His Death Sentence Must Therefore Be Vacated.

The murder for which the petitioner was convicted occurred on January 7-8, 1981. His age was 17 years and slightly more

than 4 months.[53] At the time of the alleged crime, KRS 208.170 (Eff. 7-15-80; App. 1a at 1a-2a) permitted 16 and 17 year old juveniles, who committed any felony, to be transferred to adult court. A juvenile under 16 could be transferred if he committed a Class A felony or a capital offense. The statute does not contain a minimum age for capital punishment.

Tn 1980, the Kentucky General Assembly enacted the Unified Juvenile Code which was to become effective July 1, 1982. (App. 1b at pp. 3a-4a). That legislation would have abolished capital punishment for juveniles and would have subjected them to imprisonment for a Class A felony.[54] (KRS 208F.040(1) (App. 1b at p. 4a). KRS 208.170 was to be repealed when the new legislation took effect. (KRS 202A.220, § 152; App. 1c at p. 5a).

In 1982, the Kentucky General Assembly passed legislation that postponed the effective date of the Unified Juvenile Code until July 15, 1984. (App. 1c at p. 5a).[55] The 1984 Kentucky General Assembly repealed the Unified Juvenile Code effective July 13, 1984. (App. 1c at p. 6a). On September 1, 1987, Kentucky set a minimum age of 16 for imposition of the death penalty. (KRS 640.040(1); App. 1d at p. 7a). KRS 208.170 was repealed on September 1, 1987. (App. 1d at p. 8a). Thus, from January 1, 1975, when KRS 208.170 was first made effective, until September 1, 1987, Kentucky allowed capital punishment to be imposed on juveniles regardless of their age.[56]

---

[53] The petitioner's date of birth is August 23, 1963. (J.A. 8).

[54] A Class A felony carried a term of imprisonment of 20 years to life. See KRS 532.060(2)(a). A "youthful offender" was defined as "any person regardless of age, transferred to circuit court under the provisions of this Act." KRS 208A.020(40). App. 1b at 3a.

[55] Due to funding problems, the proposed juvenile code legislation of 1980 and 1982, including the abolition of capital punishment, never took effect and was ultimately repealed in 1984. See Louisville Courier-Journal, March 11, 1986.

[56] Prior to trial, the petitioner unsuccessfully argued that imposition of the death penalty was unconstitutional because of the uncertainty of the Kentucky law. (TE 3-1-82, 71-82; TR81CR1218, Vol. III, 414-416A; TR 82CR0406, 20-21, 159-160; TE1, 35; J.A. 48-53, 70).

The plurality and concurring opinions in *Thompson* v. *Oklahoma*, when read together require that the petitioner's death sentence be vacated because Kentucky did not set a minimum age for the imposition of capital punishment on juveniles. KRS 208.170 cannot be read as establishing 16 as a minimum age for the imposition of capital punishment on juveniles, because in 1984 the Kentucky Supreme Court held that it was not a violation of the Eighth and Fourteenth Amendments for a juvenile, who was 15 years old at the time he committed a murder, to be sentenced to death. *Ice* v. *Commonwealth*, *supra*, 667 S.W.2d at 679-680, reversed on other grounds.

Kentucky did not set a minimum age for the imposition of capital punishment on juveniles until September 1, 1987, long after the crime for which the petitioner was convicted and sentenced to death. Accordingly, *Thompson*, requires that the petitioner's death sentence be vacated.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, respectfully submits that the Court should rule that the imposition of capital punishment on juveniles who are under the age of 18 when they commit a crime violates the Eighth and Fourteenth Amendments of the United States Constitution. Accordingly, the judgment of the Kentucky Supreme Court should be reversed and the petitioner's death sentence should be vacated.

Respectfully submitted,

FRANK W. HEFT, JR.*
Chief Appellate Defender
Jefferson District Public
Defender's Office
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 625-3800
Counsel for Petitioner
Counsel of Record

J. DAVID NIEHAUS
Deputy Appellate Defeder
Co-Counsel for Petitioner
DANIEL T. GOYETTE
Jefferson District
Public Defender
Of Counsel

APPENDICES

INDEX TO APPENDICES

INDEX TO APPENDICES (Continued)

APPENDIX 1a

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (p. 532)

Section 164. *KRS 208.170* is amended to read as follows:

(1) If, prior to an adjudicatory hearing in the juvenile *session of district* court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

(3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

APPENDIX 1a

(5) When the juvenile *session of district* court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile *session of district* court. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile *session of district* court.

(b) If an indictment is returned, the court may in its discretion order the case transferred to the juvenile *session of district* court.

(c) If an indictment is returned and the court does not transfer the case to juvenile *session of district* court, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

APPENDIX 1b

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (xxxvi)

Table 1—KRS Numbers and Headings

Section	*Heading (Legislative History)*	*Page*
Chapter 208F	**Youthful Offenders**	
208F.040	Sentencing appropriate for Class A felony (en S 309, § 99, 7-1-82)	899

* * *

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (pp. 848, 851)

CHAPTER 280

(S.B. 309)

AN ACT relating to juveniles

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. KRS CHAPTER 208A IS ESTABLISHED AND A NEW SECTION THEREOF CREATED TO READ AS FOLLOWS:

208A. 340 *This Act shall be known as the Kentucky Unified Juvenile Code.*

SECTION 3. A NEW SECTION OF KRS CHAPTER 208A IS CREATED TO READ AS FOLLOWS:

208A.020 *As used in this Act unless the context otherwise requires:*

(40) "Youthful offender" means any person regardless of age, transferred to circuit court under the provisions of this Act.

* * *

APPENDIX 1b

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (p. 899)

SECTION 99. A NEW SECTION OF KRS CHAPTER 208F IS CREATED TO READ AS FOLLOWS:

208F.040 *(1) No youthful offender who has been convicted of a capital offense shall be sentenced to captial punishment, but instead shall be sentenced to a term appropriate for one who has committed a Class A felony.*

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from Section 86(2), (3), (4), or (5) of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 96 of this Act.

APPENDIX 1c

BALDWIN'S 1980 KENTUCKY ACTS ISSUE (pp. 915-916)

SECTION 150. A NEW SECTION OF KRS CHAPTER 202A IS CREATED TO READ AS FOLLOWS:

Section 152. The following sections of the Kentucky Revised Statutes are repealed:

208.170 Proceedings against children suspected of felony.

* * *

BALDWIN'S KRS—1982 ACTS ISSUE (p. 852)

Chapter 284

(S.B. 282)

AN ACT relating to the Kentucky Unified Juvenile Code and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. Acts, 1980, Chapter 208, Section 153 is amended to read as follows:

This Act shall become effective on July 15, *1984* ~~[1, 1982]~~

Section 2. Whereas, 1980 Senate Bill 309 is scheduled to become effective on July 1, 1982, fifteen (15) days before the normal effective date of other legislation passed at the 1982 Regular Session of the General Assembly and would create a conflict therewith, an emergency is declared to exist and this Act shall become effective immediately upon it passage and approval by the Governor.

Approved April 2, 1982

* * *

APPENDIX 1c

BALDWIN'S KRS—1984 ACTS ISSUE (p. 521)

CHAPTER 184

(S.B. 54)

AN ACT relating to the Kentucky Unified Juvenile Code.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

[Eff. 7-13-84]

Section 1. Acts 1980, Chapter 280 and Acts 1982, Chapter 284 are repealed.

Section 2. It is the intent of the General Assembly that the amendments and repealers of Acts 1980, Chapter 280 not become effective and that statutes affected thereby remain as not amended or not repealed, except as affected by legislation other than Acts 1980, Chapter 280 and Acts 1982, Chapter 284 passed during the 1980, 1982, or this Act.

Approved April 3, 1984

APPENDIX 1d

BALDWIN'S KRS—1986 ACTS ISSUE (p. 1098)

SECTION 137. A NEW SECTION OF KRS CHAPTER 640 IS CREATED TO READ AS FOLLOWS:

640.040 Capital punishment and other prohibited dispositions [Eff. 7-1-87]

(1) No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit for parole for twenty-five (25) years.

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from subsection (2), (3), (4), (5) or (6) of Section 125 of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 129 of this Act.

* * *

APPENDIX 1d

BALDWIN'S KRS—1986 ACTS ISSUE (pp. 1120-1121)

Section 198. The following KRS sections are repealed:

208.170 Proceedings against children suspected of felony. [Eff. 7-1-87]

* * *

208.170 Proceedings against children suspected of felony

(1) If, during the course of any proceeding in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the best interests of the child and of the public require that the child be tired and disposed of under the regular law governing crimes, the court in its discretion may make an order transferring the case to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until tranferred to, tried and convicted of a felony by a circuit court.

(2) When the juvenile court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it may either return an indictment or may return a written report to the circuit court recommending that the child be committed to the department. If the court believes that such commitment would be proper, it may order the child committed to the department.

(b) If, during any stage of the trial in the circuit court, the child or his parent or guardian so requests, the judge in his discretion may stop the trial and commit the child to the department.

(c) If neither of the procedures specified in paragraphs (a) and (b) of this subsection are employed, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

APPENDIX 1d

(e) Any commitment to the department under paragraph (a) or (b) of this subsection shall be for an indeterminate period not to exceed the age of twenty-one (21).

HISTORY: 1974 H 232, § 308, eff. 1-1-75
1962 c 212, § 4; 1956 c 157, § 26; 1954 c 193, § 4; 1952 c 161, § 17

APPENDIX 1e

640.010 Preliminary hearing; proof required to try child as youthful offender in circuit court

(1) For children who are alleged to be youthful offenders by falling in the purview of KRS 635.020(2), (3), (4), (5), (6), or (7), the court shall at arraignment assure that the child's rights as specified in KRS 610.060 have been explained and followed.

(2) In the case of a child alleged to be a youthful offender by falling within the purview of KRS 635.020, the court shall upon motion by the county attorney to proceed under this chapter, conduct a preliminary hearing to determine if the child should be transferred to circuit court as a youthful offender. The preliminary hearing shall be conducted in accordance with the Rules of Criminal Procedure.

(a) At the preliminary hearing, the court shall determine if there is probable cause to believe that an offense was committed, that the child committed the offense, and that the child is of sufficient age and has the requisite number of prior adjudications, if any, necessary to fall within the purview of KRS 635.020.

(b) If the court determines probable cause exists, the court shall consider the following factors before determining n whether the child's case shall be transferred to the circuit court:

1. The seriousness of the alleged offense;

2. Whether the offense was against persons, or property, with greater weight being given to offenses against persons;

3. The maturity of the child as determined by his environment;

APPENDIX 1e

4. The child's prior record;

5. The best interest of the child and community;

6. The prospects of adequate protection of the public; and

7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available to the juvenile justice system.

(c) If, following the completion of the preliminary hearing, the court is of the opinion, after considering the factors enumerated in subsection (b) of this section, that the child should be transferred to circuit court, the court shall issue an order transferring the child as a youthful offender and shall state on the record the reasons for the transfer. The child shall then be proceeded against in the circuit court as an adult, except as otherwise provided in this chapter.

(d) If, following completion of the preliminary hearing, the court is of the opinion, after considering the factors enumerated in subsection (b) of this section that the child shall not be transferred to the circuit court, the case shall be dealt with as provided in KRS Chapter 635.

(3) If the child is transferred to circuit court under this section and the grand jury does not find that there is probable cause to indict the child as a youthful offender, as defined in KRS 635.020(2), (3), and (4), but does find that there is probable cause to indict the child for another criminal offense, the child shall not be tried as a youthful offender in circuit court but shall be returned to district court to be dealt with as provided in KRS Chapter 635.

HISTORY: 1988 c 350, § 104, eff. 4-10-88 1986 c 423, § 134

APPENDIX 2a

Statistical Data Concerning Racial Composition of Juveniles Committing Various Offenses in Jefferson County, Kentucky 1975-1979*

—Introduced in Hearing 3/1/82 (TE 3-1-82, 93-97)

—See also J.A. 32-35

1. Assault	2. Homicide	3. Rape
W 371—51.1%	W 23—42.6%	W 53—53%
B 355—48.9%	B 31—57.4%	B 47—47%
726	54	100

4. Felonious Sex Offenses	5. Robbery
W 41—61.2%	W 324—41.9%
B 26—38.8%	B 450—58.1%
67	774

6. Burglary	7. Receiving Stolen Property Over $100.00
W 3174—64.6%	W 202—67.1%
B 1740—35.4%	B 99—32.9%
4914	301

8. Wanton Endangerment I	9. Theft over $100.00[1]
W 200—61.7%	W 1520—64%
B 124—38.3%	B 855—36%
324	2375

*The statistics contained in Appendices 2a-e are taken from the 1975-1979 Annual reports of the Kentucky Department of Human Resources (DHR) and DHR business records which were introduced into evidence during the juvenile court proceedings and were utilized by John Metzler in his testimony in circuit court on March 1, 1982 (J.A. 28-36; TE 3/1/82, 85-98). This evidence was made part of the record on appeal in the Kentucky Supreme Court [see manila envelope marked Transcripts and Papers from Juvenile Court (Defense Exhibits 1-5)].

[1]This category combines offenses listed as Grand Larceny or Theft Over $100.00 (J.A. 34-35).

APPENDIX 2b

Juvenile Referrals by Planning Service Community, Race and Year*

	Five Year Total					
	White		Black		Total	
P.S.C.	No.	%	No.	%	No.	%
1	322	16.5	1,625	83.5	1,947	100.0
2	1,904	66.5	958	33.5	2,862	100.0
3	85	9.5	811	90.5	896	100.0
4	1,919	45.9	1,200	54.1	2,219	100.0
5	137	6.1	2,127	93.9	2,264	100.0
6	380	15.7	2,041	84.3	2,421	100.0
7	230	27.3	612	72.7	842	100.0
8	1,004	83.1	204	16.9	1,208	100.0
9	2,154	89.7	247	10.3	2,401	100.0
10	3,032	91.1	296	8.9	3,328	100.0
11	3,927	96.9	126	3.1	4,053	100.0
12	3,300	94.1	206	5.9	3,506	100.0
13	4,078	79.6	1,042	20.4	5,120	100.0
14	2,008	94.6	115	5.4	2,123	100.0
15	1,514	93.8	100	6.2	1,614	100.0
Out of County	1,972	90.6	204	9.4	2,176	100.0
Total	27,066	69.4	11,914	30.6	38,980	100.0

* "Planning Service Community" is a specifically designed section of Jefferson County.

APPENDIX 2b

Grand Jury Referrals by Planning Service Community, Race and Year

	Five Year Total					
	White		Black		Total	
P.S.C.	No.	%	No.	%	No.	%
1	0	—	8	100.0	8	100.0
2	2	40.0	3	60.0	5	100.0
3	0	—	3	100.0	3	100.0
4	1	16.7	5	83.3	6	100.0
5	0	—	4	100.0	4	100.0
6	2	22.2	7	77.8	9	100.0
7	0	—	2	100.0	2	100.0
8	1	100.0	0	—	1	100.0
9	3	100.0	0	—	3	100.0
10	3	75.0	1	25.0	4	100.0
11	2	100.0	0	—	2	100.0
12	2	66.7	1	33.3	3	100.0
13	0	—	3	100.0	3	100.0
14	0	—	0	—	0	—
15	1	100.0	0	—	1	100.0
Out of County	1	50.0	1	50.0	2	100.0
Total	18	32.1	38	67.9	56	100.0

Manner of Handling by Race and Year.

Year	White						Black					
	Formals		Informals		Total		Formals		Informals		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1979	3,254	59.5	2,219	40.5	5,473	100.0	1,667	73.5	602	26.5	2,269	100.0
1978	3,100	61.2	1,964	38.8	5,064	100.0	1,724	71.8	678	28.2	2,402	100.0
1977	3,186	62.2	1,935	37.8	5,121	100.0	1,726	74.0	605	26.0	2,331	100.0
1976	3,422	62.4	2,061	37.6	5,483	100.0	1,933	74.7	653	25.3	2,586	100.0
1975	3,508	59.2	2,417	40.8	5,925	100.0	1,636	70.3	690	29.7	2,326	100.0
Total	16,470	60.9	10,596	39.1	27,066	100.0	8,686	72.9	3,228	27.1	11,914	100.0

Year	Total					
	Formals		Informals		Total	
	No.	%	No.	%	No.	%
1979	4,921	63.6	2,821	36.4	7,742	100.0
1978	4,824	64.6	2,642	35.4	7,466	100.0
1977	4,912	65.9	2,540	34.1	7,452	100.0
1976	5,355	66.4	2,714	33.6	8,069	100.0
1975	5,144	62.3	3,107	37.7	8,251	100.0
Total	25,156	64.5	13,824	35.5	38,980	100.0

Homicide Referrals by Sex, Race and Year.

Year	White				Black				Total	
	Male	Female	Sub T No.	Sub T %	Male	Female	Sub T No.	Sub T %	No.	%
1979	4	0	4	44.4	5	0	5	56.6	9	100.0
1978	5	0	5	50.0	3	2	5	50.0	10	100.0
1977	3	0	3	23.1	9	1	10	76.9	13	100.0
1976	7	2	9	56.3	7	0	7	43.8	16	100.0
1975	2	0	2	33.3	4	0	4	66.7	6	100.0
Total	21	2	23	42.6	28	3	31	57.4	54	100.0

Homicide Referrals by Disposition and Year.

Year	F.A.W.L.*		Grand Jury		Delinquent Institution		Probation		Community Resources		Other		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1979	4	44.4	2	22.2	2	22.2	1	11.1	0	—	0	—	9	99.9
1978	4	40.0	1	10.0	1	10.0	3	30.0	1	10.0	0	—	10	100.0
1977	5	38.5	2	15.4	3	23.1	2	15.4	1	7.7	0	—	13	100.1
1976	4	25.0	2	12.5	5	31.3	2	12.5	0	—	3	18.8	16	100.1
1975	1	16.7	1	16.7	3	50.0	0	—	1	16.7	0	—	6	100.1
Total	18	33.3	8	14.8	14	25.9	8	14.8	3	5.6	3	5.6	54	100.0

*Filed Away With Leave To Re-instate (dismissal without prejudice).

APPENDIX 2e

Grand Jury Referrals by Offense Category and Year.

Year	Major Property		Social Control		Persons (Phy. Harm)		Persons (No Harm)		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
1979	0	—	0	—	6	100.0	0	—	6	100
1978	4	26.7	1	6.7	9	60.0	1	6.7	15	100
1977	2	22.2	0	—	6	66.7	1	11.1	9	100
1976	5	45.5	0	—	6	54.5	0	—	11	100
1975	10	66.7	1	6.7	3	20.0	1	6.7	15	100
Total	21	37.5	2	3.6	30	53.6	3	5.4	56	100

APPENDIX 3a

AGE RESTRICTIONS ON PUBLIC OFFICE HOLDERS IN KENTUCKY

Office	Age	Constitutional Or Statutory Authority
Governor	30	Ky.Const. § 72
Lieutenant Governor	30	Ky.Const. § 82
State Senator	30	Ky.Const. § 32
State Representative	24	Ky.Const. § 32
Treasurer, Auditor or Public Accounts, Register of the Land Office, Commissioner of Agriculture, Secretary of State, Attorney General and Superintendent of Public Education	30	Ky.Const. § 91
Commonwealth's Attorney, County Judge Executive County Attorney, Sheriff, Jailer, Coroner, Surveyor, Assessor, Justice of the Peace and Constable	24	Ky.Const. §§ 97, 99 and 100
County Clerk and Circuit Court Clerk	21	Ky.Const. §§ 97, 99 and 100
County Commissioner	24	KRS 67.063
Mayor	25	KRS 83A.040(1)
Member, Board for Louisville and Jefferson County Children's Home	25	KRS 201.020
Member, City Housing Authority	24	KRS 80.040
Member, City Legislative Body	21	KRS 83A.040(3)
Member, Local School District Board	24	KRS 160.180
Member, State Board of Education	30	KRS 156.040
Member, State Board of Elections	25	KRS 117.015

APPENDIX 3b

AGE RESTRICTIONS ON OCCUPATIONS IN KENTUCKY REQUIRES MINIMUM AGE OF 18 UNLESS OTHERWISE NOTED

Occupation	Statute
Certification as school superintendent, principal, teacher, supervisor, director of pupil personnel or other public school position for which certification is required	KRS 161.040
Podiatrist	KRS 311.420
Dentist	KRS 313.040
Dental Hygenist	KRS 313.290
Pharmacist	KRS 315.050
Embalmer	KRS 316.030
Funeral Director	KRS 316.090
Barber	KRS 317.450
Cosmetologist	KRS 317A.050
Master or Journeyman Plumber	KRS 318.040
Optometrist	KRS 320.250
Veterinarian	KRS 321.260
Architect	KRS 323.040
Real Estate Broker or Associate	KRS 324.040
Certified Public Accountant	KRS 325.261(2)
Ophthalmic Dispenser	KRS 326.040
Handwriting Examiner	KRS 329.030
Auctioneer	KRS 330.070(1)
Own a Driver Training School or Act as a Driver Training Instructor (age 21)	KRS 332.030(1)(5) and (3), respectively
Hearing Aid Dealer and Fitter	KRS 334.050
Certified Social Worker	KRS 335.080(1)(a)
Social Worker	KRS 335.050(1)(a)

APPENDIX 3c

KENTUCKY LAWS RESTRICTING CONDUCT OF JUVENILES

A juvenile [a person under 18—Ky.Rev.Stat. (KRS) 2.015] cannot:

1. Purchase candy or confections having a liquid filling or liquid containing alcohol—KRS 244.650.
2. Serve as a jury commissioner—KRS 29A.080(2)(a).
3. Work in the care and treatment of handicapped children—KRS 2.015.
4. Be a state police officer—KRS 16.040.
5. Be a member or employee of a county's police force—KRS 70.540.
6. Be a civil service employee—KRS 90.330.
7. Obtain a driver's license without parental consent—KRS 186.470.
8. Marry without parental consent—KRS 402.020(4); KRS 402.210.
9. Obtain employment to sell or produce alcoholic beverages—KRS 244.090.
10. Be a taxi driver or chauffeur of a vehicle for hire—KRS 281.726.
11. Enter a pool hall—KRS 436.320.
12. Pawn property—KRS 226.030.
13. Receive non-emergency dental and medical care without parental consent—KRS 214.185 and KRS 216B.400.
14. Participate in a professional boxing or wrestling match or exhibition—KRS 229.121.
15. Change his or her name—KRS 401.010. However, a parent can have a minor's name changed. KRS 401.020.

APPENDIX 3c

16. Be administrator of an insurance plan, fund or group—KRS 304.9-052.
17. Be an agent or solicitor of insurance—KRS 304.9-105.
18. Execute an anatomical gift—KRS 311.175.

APPENDIX 4

JURISDICTIONS WITH MINIMUM AGE FOR IMPOSITION OF CAPITAL PUNISHMENT

Age When Crime Committed	Jurisdiction
18	California (Cal. Penal Code § 190.5 (Supp. 1987))
	Colorado (Col. Rev. Stat. 16-11-103(1)(a) (Repl. 1986))
	Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (1985))
	Illinois (38 Ill. Ann. Stat. § 9-1(b) (Supp. 1988))
	Maryland (27 Md. Code § 412(f) (Supp. 1988))
	Nebraska (Nebr. Rev. Stat. § 28-105.01 (1985))
	New Hampshire (N.H. Rev. Stat. Ann. § 630:5 (XIII) (Supp. 1988)) (prohibiting execution of one who was a minor at the time of crime); *Id.* at § 21-B:1 (age of majority in New Hampshire is age 19), but see *Id.* at § 630:1(v) (prohibits holding anyone under age 17 to be guilty of a capital offense).
	New Jersey (N.J. Stat. Ann. §§ 2A:4A-22(a) (1987) & 2C:11-3g (Supp. 1988))
	New Mexico (N.M. Stat. Ann. §§ 28-6-1(A) (1987) & 31-18-14(A) (Repl. 1987))
	Ohio (Ohio Rev. Code Ann. § 2929.02 (1987))
	Oregon (Ore. Rev. Stat. §§ 161.620 & 419.476(1) (1987))

APPENDIX 4

Tennessee (Tenn. Code Ann. §§ 37-1-102(3) (Supp. 1988), 37-1-103 (Repl. 1984), 37-1-134(a)(1) (Repl. 1984))

17 Georgia (Ga. Code Ann. § 17-9-3 (Supp. 1988))

North Carolina (N.C. Gen. Stat. § 14-17 (Supp. 1988))

Texas (Tex. Penal Code Ann. § 8.07(d) (Supp. 1988))

16 Indiana (Ind. Code Ann. § 35-50-2-3 (Supp. 1988))

Kentucky (Ky. Rev. Stat. Ann. 640.040(1) (1987))

Nevada (Nev. Rev. Stat. § 176.025 (1986))

APPENDIX 5

INTERNATIONAL RESTRICTIONS ON CAPITAL PUNISHMENT

Source: Amicus Curiae brief filed by Amnesty International in *Wilkins* v. *Missouri*, 87-6026 (p. 24 & Appendix A1-A7—lists 180 countries).

34 countries preclude capital punishment in all cases (A-1—A-2).

20 countries limit capital punishment to cases involving "crimes under military law or for crimes committed under exceptional circumstances." (Brief p. 24 and App. A-2—A-3).

65 countries have capital punishment but excludes it for all juveniles (all persons under the age of 18 when crime committed—Brief p. 4 n.3 and A-3—A-7).

24 countries have ratified the International Covenant on Civil & Political Rights (Article 6 (5))* and/or The American Convention on Human Rights (Article 4 (5)) which prohibit imposition of capital punishment on juveniles. (A-4—A-7).

* Ireland has signed but has not ratified the Covenant and has not had an execution in at least 10 years. (A-3, A-5).

APPENDIX 6

PERSONS SENTENCED TO DEATH IN UNITED STATES, 1982-1987

Source: U.S., Department of Justice, Bureau of Justice Statistics, Bulletin, Capital Punishment, 1987, p. 10, Appendix Table 1.

Year	Persons Sentenced to Death
1982	276
1983	262
1984	295
1985	289
1986	310
1987	299
Total	1,731

APPENDIX 7

JUVENILES SENTENCED TO DEATH, 1982-1987

Sources: Streib Death Penalty for Juveniles, table 2-2, pp. 28-29; Appendix N—*Amicus Curiae* Brief of Florida Capital Collateral Representation in Case at Bar; Information Provided by Prof. Victor Streib to Counsel for Petitioner in October, 1988.

Year	Offender's Name	Age at Crime	Race	State	Current Status
1982	Barrow, Lee	17	W	TX	reversed in 1985
	Cannon, Joseph	17	W	TX	on death row
	Carter, Robert	17	B	TX	on death row
	Garrett, Johnny	17	W	TX	on death row
	Johnson, Lawrence	17	B	MD	reversed twice but resentenced to death in 1983 and 1984
	Lashley, Frederick	17	B	MO	on death row
	Legare, Andrew	17	W	GA	reversed in 1983; resentenced to death in 1984; reversed in 1986
	Stanford, Kevin	17	B	KY	on death row
	Stokes, Freddie	17	B	NC	reversed in 1982; resentenced to death in 1983; reversed in 1987
	Thompson, Jay	17	W	IN	reversed in 1986
	Trimble, James	17	W	MD	on death row
1983	Bey, Marko	17	B	NJ	on death row
	Cannady, Attina	16	W	MS	reversed in 1984
	Harris, Curtis	17	B	TX	on death row
	Harvey, Frederick	16	B	NV	reversed in 1984
	Hughes, Kevin	16	B	PA	on death row

APPENDIX 7

Year	Offender's Name	Age at Crime	Race	State	Current Status
	Johnson, Lawrence	17	B	MD	reversed in 1983, but resentenced to death in 1984
	Lynn, Frederick	16	B	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	B	MS	reversed in 1985
	Stokes, Freddie	17	B	NC	reversed in 1987
1984	Aulisio, Joseph	15	W	PA	reversed in 1987
	Brown, Leon	15	B	NC	reversed in 1988
	Johnson, Lawrence	17	B	MD	on death row
	Legare, Andrew	17	W	GA	reversed in 1986
	Patton, Keith	17	B	IN	reversed in 1987
	Thompson, Wayne	15	W	OK	reversed in 1988
1985	Livingston, Jesse	17	B	FL	reversed in 1988
	Morgan, James	16	W	FL	on death row
	Ward, Ronald	15	B	AR	reversed in 1987
	Williams, Raymond	17	B	PA	reversed in 1987
	Wills, Bobby	17	B	TX	on death row
1986	Comeaux; Adam	17	B	LA	reversed in 1987
	Cooper, Paula	15	B	IN	on death row
	LeCroy, Cleo	17	W	FL	on death row
	Lynn, Frederick	16	B	AL	on death row
	Sellers, Sean	16	W	OK	on death row
	Wilkins, Heath	16	W	MO	on death row
	Williams, Alexander	17	B	GA	on death row
1987	Dugar, Troy	15	B	LA	on death row
	Lamb, Wilbur	17	W	FL	on death row

APPENDIX 8

JURISDICTIONS LISTING "YOUTH" AS A MITIGATING CIRCUMSTANCE*

1. Arkansas—Ark.Stat.Ann. 5-4-605(4) (1987).
2. Indiana—Ind. Code Ann. 35-50-2-9(c)(7) (Supp. 1988) - Age of defendant if less than 18 years of age when crime committed.
3. Kentucky—Ky.Rev.Stat. 532.025(2)(b)(8).
4. Louisiana—La. Code Crim. Pro. Art. 905.5(f).
5. Montana—Mont. Code Ann. 46-18-304 (1987) - Age of defendant if less than 18 years of age when crime committed.
6. Nevada—Nev.Rev.Stat. 200.035(6) (1986).
7. South Carolina—S.C. Code Ann. 16-3-20(6)(9) (Supp. 1987) - Age of defendant was below age of 18 when crime committed.
8. Utah—Utah Code Ann. 76-3-206.

*Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 9

JURISDICTIONS LISTING "AGE" AS A MITIGATING CIRCUMSTANCE*

1. Alabama—Ala. Code Ann. 13A-5-51(7) (1982).
2. Arizona—Ariz.Rev.Stat.Ann. 13-703(g)(5) (Supp. 1987).
3. Florida—Fla.Stat.Ann. 921.141(6)(g) (1985).
4. Mississippi—Miss.Code Ann. 99-19-101(6)(g) (Supp. 1988).
5. Missouri—Mo.Ann.Stat. 565.032(7) (Supp. 1988).
6. North Carolina—N.C. Gen. Stat. 15A-2000(f)(7) (1988).
7. Pennsylvania—Pa.Stat.Ann. Title 42 § 9711 (1982).
8. Virginia—Va.Code 19.2-264.4(B)(v) (1983).
9. Washington—Wash. Rev. Code Ann. Title 10 Chap. 10.95.070(7) (Supp. 1988).
10. Wyoming—Wyo.Stat.Ann. 6-2-102(j)(vii) (1988).

* Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 10

JURISDICTIONS WHICH DO NOT SPECIFICALLY LIST MITIGATING CIRCUMSTANCES*

1. Delaware—Del.Code Ann. Title 11 § 4209(c) (1987).
2. Georgia—Ga.Code Ann. Title 17-10-2 and Title 17-10-30(b) (1982).
3. Idaho—Idaho Code 19-2515 (1987).
4. Oklahoma—Okla.Stat.Ann. Title 21 § 701.10 (Supp. 1988).
5. South Dakota—S.D. Codified Laws Title 23A § 23A-27A-1.
6. Texas—Tex. Code of Crim. Proc. Art. 37.071(a) (Supp. 1988).

* Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 11

STATUTES SETTING FORTH STANDARDS OF PROOF FOR TRANSFER OF JUVENILES TO ADULT COURT*

1. Georgia—Ga. Code Ann. Title 15 § 11-39(a)(3)(a-c) (Supp. 1988) - reasonable grounds to believe (a) child committed offense (b) is not committable to institution for mentally retarded or mentally ill and (c) interests of child and community require that child be placed under legal restraint and the transfer be made to appropriate court.

2. Louisiana—La. Rev.Stat.Ann. § 13.157.1(4)(a) - Probable cause to believe juvenile committed crime. - § 13.157.1(4)-(b) - No prior felony offenses - "no substantial opportunity for rehabilitation" in available juvenile facilities. - § 13.157.1(4)(b) - Prior felony conviction - "[R]easonable grounds to believe [juvenile] is not amenable to treatment or rehabilitation" in available juvenile facilities.

3. Mississippi—Miss. Code Ann. § 43-21-157(3) - (Supp. 1988) - probable cause to believe child committed crime. (4) Upon finding probable cause, youth court may transfer jurisdiction if youth court finds by clear and convincing evidence that there are no reasonable prospects of rehabilitation within juvenile justice system. § 43-21-157(5) sets forth factors to be considered by youth court in determining reasonable prospects of rehabilitation within the juvenile justice system.

4. Montana—Mont. Code Ann. § 41-5-206(1)(d) - probable cause to believe child committed crime; that it was committed "in an aggressive, violent, or premeditated manner", and that seriousness of offense and protection of community require treatment beyond that afforded by juvenile facilities.

* Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 11

5. Pennsylvania—Pa. C.S.A. Title 42 § 6355(a)(4)(i) *prima facie* case that child committed offense; (a)(4)(iii)(A) reasonable grounds to believe child not amenable to treatment as juvenile in available facilities, (B) child is not committable to institution for mentally retarded or mentally ill; and (C) interests of community require that child be placed under legal restraint or discipline or crime would carry a sentence of more than 3 years if committed by adult.

APPENDIX 12

JUVENILE TRANSFER STATUTES REQUIRING ONLY SHOWING OF PROBABLE CAUSE TO BELIEVE JUVENILE COMMITTED CRIME*

1. Alabama—Ala. Code § 12-15-34(6)(f).
2. Arizona—Ariz. Rules of Procedure - Juvenile Ct. Rule 14(c).
3. Indiana—Ind. Code Ann. § 31-6-2-4(c)(2).
4. Kentucky—Ky. Rev. Stat. 208.170(2) - in effect at time of petitioner's transfer. Ky. Rev. Stat. 640.010(2)(a) - present statute as amended 4-10-88.
5. North Carolina—N.C. Gen. Stat. § 7A-608.
6. Texas—Tex. Code Ann. Family Code § 54.02(j)(5).
7. Utah—Utah Code Ann. § 78-3a-25(5); § 3 also provides that weight given to transfer factors is in court's discretion.
8. Virginia—Va. Code Ann. § 16.1-269(A)(3)(a).

*Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.

APPENDIX 13

STATUTES WHICH DO NOT CONTAIN ANY STANDARD OF PROOF FOR TRANSFER OF JUVENILES TO ADULT COURT*

1. Arkansas—Ark Code Ann. 9-27-324.
2. Delaware—Del. Code Ann. Title 10 § 938(c) (Supp. 1986) - Juvenile has burden of demonstrating that juvenile court should retain jurisdiction when specified felony is committed. *State* v. *Anderson*, Del. Super. 385 A.2d 738 (1978).
3. Florida—Fla. Stat. Ann. § 39.09(2) - court instructed to consider "The prosecutive merit of the complaint". Fla. Stat. Ann. § 39.09(2)(c)(4).
4. Idaho—Idaho Code § 16-1806(8) - Amount of weight court gives to waiver factors is discretionary. See also *Wolf* v. *State*, 99 Idaho 476, 583 P.2d 1011 (1978). Idaho does not require "a finding of probable cause as an element of the waiver hearing." Id. 583 P.2d at 1014.
5. Missouri—Mo. Ann. Stat. § 211.071.
6. Nevada—Nev. Rev. Stat. § 62.080.
7. Oklahoma—Okla. Stat. Ann. Title 10 § 1112(b) - "prosecutive merit" must exist.
8. South Carolina—S.C. Code Ann. § 20-7-430.
9. South Dakota—S.D. Codified Laws § 26.11-1 and § 26-11-4. 26-11-4(4) circuit court when considering whether to retain jurisdiction over child may consider "The prosecutive merit of the complaint. The state shall not be required to establish probable cause to show prosecutive merit."
10. Washington—Wash. Rev. Code Ann. § 13.40.110.
11. Wyoming—Wyo. Stat. § 14-6-237.

*Excludes those jurisdictions which specifically prohibit capital punishment for juveniles and adults.